The Law and Politics of the Crime of Aggression

de Hoon, A.M.

2015

document version
Publisher's PDF, also known as Version of record

THE LAW AND POLITICS OF THE CRIME OF AGGRESSION

ISBN 978-90-824698-0-6

VRIJE UNIVERSITEIT

The Law and Politics of the Crime of Aggression

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad Doctor aan
de Vrije Universiteit Amsterdam,
op gezag van de rector magnificus
prof.dr. V. Subramaniam,
in het openbaar te verdedigen
ten overstaan van de promotiecommissie
van de Faculteit der Rechtsgeleerdheid
op woensdag 16 december 2015 om 15.45 uur
in de aula van de universiteit,
De Boelelaan 1105

door

Anne Marie de Hoon

geboren te Dordrecht

Promotoren: prof.dr. W.G. Werner
prof.dr.mr. E. van Sliedregt

Leescommissie: prof.dr. Ige Dekker (Utrecht University)
prof.dr. Mark Drumbl (Washington & Lee University)
prof.dr. Marlies Glasius (University of Amsterdam)
prof.dr. Martti Koskenniemi (University of Helsinki)
dr. Sarah Nouwen (Cambridge University)
prof.dr. Louis Sicking (VU University (Amsterdam))

ACKNOWLEDGMENTS

This book is a result of 5 years of PhD research at the VU University in Amsterdam. These years have been intellectually challenging, invaluable for my professional development, and great fun. My first thanks go to the VU University's Faculty of Law for creating and funding a PhD position on the crime of aggression and for selecting me for it. It has been an incredible privilege to be enabled to spend 5 years of thinking, discussing, reading and writing about the topics that fascinate and inspire me most.

I could not have developed this research approach, analysis and the book that resulted from it without the supervision, mentoring and support of my PhD supervisors, Wouter Werner and Elies van Sliedregt. I have had the privilege to work closely with Wouter and learn from him on a daily basis throughout these past years. During those years, he taught me to peel off layers, to push my thinking into deeper conceptual layers, to unravel what makes complexities complex, and to resist the temptation of thinking in solutions and instead empower the analysis of the tensions and difficulties by keeping the research focus on that which is in and of itself interesting, powerful and important enough. In addition to helping me become a better researcher, he helped me develop myself as a teacher by allowing me to create my own courses and teaching methods; and as an academic by stimulating me to present my work all over the world, search for schools of thought that matched with my own thinking, and build networks with fellow academics to learn from, discuss work with, and develop projects with. It has been the best doctoral training period anyone could wish for and I am greatly indebted to the generosity of time he gave me and the ever open door. I am also grateful to my second supervisor Elies, who has given me the freedom and confidence to develop a more critical approach to international criminal law than I started out with, coming from law school with an idealistic hope in the power of international criminal law. Without losing this idealism, she gave me the encouragement to be critical and to take pride in the sometimes heated responses I got rather than feel insecure. Elies moreover mentored me prior to my PhD years on the topics I chose for research projects, on which master's program to choose, and how to develop a career in international criminal law. I am very grateful to both for placing their confidence in me by selecting me for the position, and the time they dedicated to helping me develop as a scholar.

Furthermore, I would like to thank the two research institutes in Helsinki and Oxford that have hosted me for research stays, during which I benefited greatly from my wonderful colleagues and the tranquility and mental space to write important parts of this thesis. In 2012, the Erik Castrén Institute of International Law and Human Rights at the University of Helsinki offered a warm and welcoming home during the cold Finnish winter, with a pleasant mix of critical discussions and hilarious coffee hours. A special thanks is due to Martti Koskenniemi, who was incredibly generous in his

time to read and comment on my work, challenge me intellectually, and mentor me there and in the years after. Thanks also go to Jan Klabbers, Nanna, Alice and my other colleagues that were there during my stay for the inspiration and challenging discussions. In 2014, the Faculty of Law of the University of Oxford and the Oxford Martin Programme on Human Rights for Future Generations hosted me as a visiting academic. I thank Dapo Akande especially for the generosity of his time to give constructive feedback about my research regularly throughout the months I spent in Oxford, as well as for introducing me into the Oxford academic bubble and to my fine colleagues there. Jaakko, Dominic, Gilles and Zoe: thank you for the great office fun and focus at Pembroke College.

Thanks are also due to the two professors who have placed their trust in me ever since I was in the first year of law school, even if most of the time half a world away: Michael Scharf and Paul Williams. Michael inspired me to specialize in international criminal law, always believed in me and helped me find my voice and understand my audience, and Paul showed me the width of international legal practice and the supportive role that theory and practice have on one another. Thank you for taking me into the Public International Law & Policy Group family, for giving me the opportunity and space to set up our Netherlands Office and find my own way, and for always believing in me and mentoring me. You both are true inspirations in how to use your brains and legal skills to do good in the world. I am moreover greatly indebted to Brianne McGonigle Leyh with whom I have run PILPG's Netherlands Office since 2008, for her friendship and wonderful partnership, and for holding the fort whenever my focus was needed elsewhere. Julie Fraser, Coman Kenny, and the many other PILPGers with whom I worked these past years: thank you for the support, the cool projects that pulled me from theory onto the dirty ground, and the flexibility. Without your support, I could not have combined our PILPG work with writing this book.

I am moreover indebted to many other academics that have been incredibly generous and supportive by reading and commenting on my work throughout the past years. This greatly helped me develop my approach and analysis. Sarah Nouwen who was my ever first discussant for my ever first international paper presentation which was followed by several subsequent occasions: always stimulating, challenging and constructive; Ige Dekker for helping me develop my research proposal and approach and challenging me to stop thinking in how to solve the problems I identified and focus on a deeper understanding of the problems themselves; Jessica Lawrence, my office mate, travel buddy, reading companion, and friend, who shared all the gems she stacks up in her incredible mind to discuss my work and the theories that could support it, preferably with a good bottle of wine; Mark Drumbl, Frank Biermann, Tanja Aalberts, Philip Liste, Fritz Kratochwil, Sara Kendall, Barbora Hola, Nik Rajkovic, Veronika Bilkova, Stephen Neff, James Nixey, Kjersti Lohne, Richard Collins, Sofia Stolk, Lianne Boer, Jillian Dobson, Immi Tallgren, Maj Lervad Grasten, Alexis Galán Ávila, Ciarán Burke, Vidya Kumar, and Frédéric Mégret: I am

very grateful for your friendship and for lending your extraordinary minds by critically reading my work and constructively commenting on it.

In addition, I would like to thank my wonderful colleagues at the Transnational Legal Studies department at the VU Law Faculty and its Centre of the Politics of Transnational Law for offering such an inspiring, collaborative and warm working environment. Without you having my back when it was needed, standing next to me when imagining how to develop my argument forward, and celebrating with me when celebration was due, the book would not have become what it has been able to become. All this is true as well and more for my amazing friends Barbora Hola, Jessica Lawrence, Kjersti Lohne and Annika van Baar. From reading and discussing theory, writing together in the woods, drinking wine and oh so many bubbles, thank you for helping me think in new directions and help me solve puzzles, keeping me sane and enjoying life together.

Last but not least, thank you to my family and friends for the safety and friendship, non-academic talk and welcome distraction. To my parents, particularly, for teaching me to believe in my own abilities, to my brother for always being my best friend and companion and the always stimulating discussions on how to run the world and the organizations we live in, and to Josien, Charlotte, Pim, Wouter, John, Janna, Laurens, Bart, Ilja, Melle, Ragild, Adriaan, Anouck and Erik: thank you for helping me enjoy life and get this dissertation done.

TABLE OF CONTENTS

1. INTRODUCTION

About an hour after midnight on the morning of 12 June 2010, delegations from the member states of the International Criminal Court (ICC) that were gathered in Kampala, Uganda, came to a consensus agreement on the definition of the crime of aggression and a procedural regime to allow the ICC to exercise jurisdiction over aggression.[1] They decided that in the future, the ICC could become able to address situations of aggressive use of force by prosecuting state leaders for planning, preparing, initiating or executing aggressive resort to armed force against other states. Whatever exactly falls within the scope of this amendment is contentious, as is discussed throughout this book, but it excludes lawful use of force, namely force in self-defense and pursuant to a Security Council Resolution under Chapter VII of the UN Charter.

With that amendment to the ICC Statute, the Kampala delegates tried to respond to an age-old problem: how to prevent aggressive war between communities, and in later times, between states. Human beings' ability to use tools and to develop them into powerful weaponry has caused inter-human violence to become increasingly a-symmetrical. Offensive capabilities have grown with the development of weapons. For example, spear throwing and archery placed bodily distance between attackers and attacked, and this distance has increased throughout history with the discovery of gunpowder, flight, nuclear bombs, robotics, drones, and cyber warfare. This growth in offensive capability laid bare an increasing defensive vulnerability.[2] With the increasing decisive first-strike capability that came with increasingly powerful tools, the human fighter developed an enormous advantage to the side that strikes first. In a world where the side that strikes first gains such a huge advantage, the temptation to be the 'aggressor' rather than the 'defender' mounts. Parties to a conflict become locked in a 'security dilemma' variant of the 'prisoner's dilemma,' where both sides must assume that the other will strike first if they themselves refrain from doing so.[3]

In an attempt to address such aggressive threats, societal regulatory mechanisms have been sought to keep competition over scarcity (in whatever form or shape) within non-violent channels. Moreover, through negotiation, diplomacy, defensive pacts, (counter-)intelligence, inciting insurgence abroad, and coerced submission of one community/state to another are all means with which entities have attempted to strengthen their own power vis-à-vis the other's aggressive potential.[4]

---

[1] Formally, the date of consensus is registered as 11 June 2010, since 'the clocks were stopped' at midnight to allow the consensus to fall within the earlier agreed upon timeframe.

[2] To compare, an animal without tools always needs to put its own body at risk to attack, and thereby risks its own life in the case it gets wounded.

[3] Azar Gat, *War in Human Civilization* (Oxford University Press, 2006), at 132.

[4] Inter-communal cooperation in solidary defensive pacts, for example, have tried to benefit from the power of numbers by agreeing to come to each other's assistance against aggressive neighbors. Another example is the paramilitary community that Chinese philosopher Mo Tzu (or Mo Ti) founded

In the past 100-150 years, solutions to the problem of aggressive war have increasingly been sought in international law. States have concluded treaties, bilateral and multilateral, to condemn and reject aggression as a means of engaging in international relations. Defensive pacts led to institutions aiming for universal membership to unite all states against aggressors. And judiciary mechanisms were created to adjudicate questions of the aggressiveness of war or other international disputes to prevent states from resorting to force to fight for their rights. At the ICC Review Conference in Kampala, this strategy of addressing the problem of aggression through law culminated in a provision to prosecute individuals for their role in aggressive war in an international criminal court of law. This book discusses this specific manner of dealing with aggression through law, and more specifically, through international criminal law.

The book tells two stories. The first story is that of the regulation and criminalization of the notion of aggression. This narrative explores how the right of states to resort to force has changed into a crime of aggression over the past 100 years, and how this process saw several repeating dynamics of contestation, postponement, diplomatic maneuvering, and proceduralization in the form of delegating decisions about the substantively fundamentally disagreed upon issues elsewhere, but off the diplomats' table. The second story tells of the different ways in which the relationship between law and politics materializes in these discussions on aggression. It describes how the regulation and criminalization of aggression can be read as a story about seeking law as a means to suspend the politics of war decisions, but not getting past contestation on where to draw the line between what is and what is not aggression, and then getting to consensus through diplomatic skillfulness and procedural arrangements. This second story reframes the first, and draws attention to how the regulation and criminalization of aggression (the first story) shows how law and politics relate to and mutually (re)constitute one another.

The main questions are therefore, first, how the Kampala crime of aggression amendment came into existence and came to be constructed as it was. And second, in what ways law and politics relate to one another and what kinds of law and politics are produced in the construction of the crime of aggression. Law and politics are not meant here as separate realms. Rather, the research is about how, in the regulation and criminalization of aggression, political contexts produce particular kinds of legal constructs and how these kinds of legal constructs generate certain kinds of politics. The research is therefore about the law generated by the politics of regulating aggression and about the politics that is generated through this legal construction, and thus about how law and politics co-constitute each other in the construction of the crime of aggression.

---

around 400 BC to come to the rescue of small state-like entities under aggressive attack, to give practical consequence to his condemnation of military aggression as the greatest of all crimes. See for more on Mo Tzu's writings and activities against aggressive war, Burton Watson (trans.), *Mo Tzu: Basic Writings* (Columbia University Press, 1963); Angus C. Graham, *Later Mohist Logic, Ethics and Science* (School of Oriental and African Studies, University of London, 1978).

Those engaging in the international criminal justice project are currently in the process of exploring how best to deal with the new crime of aggression. This book aims to contribute to this development by offering an analysis of the notion of aggression to its conceptual core and by tracing its historical roots, beyond its mere jurisprudential application in a court of law. Only by understanding the law and politics of the notion of aggression can a sensible effort be undertaken to work with the crime of aggression in striving for the highly ambitious aims that it is associated with: such as contributing to the suppression of aggressive war, to maintaining peace and security, to ending impunity for those engaging in aggressive use of force, and to seeking justice for those that are affected by aggression. Striving after socio-political goals like these, with a legal notion that regulates the most political decision a state has (resorting to force to protect its way of life, in narrower or broader interpretations thereof), requires a profound understanding of the interaction of law and politics and how their interaction has (re)constituted and (re)shaped the notion of aggression throughout history to arrive at the crime of aggression amendment that was adopted in Kampala.

1.1 About the Law and Politics of the Notion of Aggression

The crime of aggression amendment that was adopted in Kampala provides that an act of aggression means the use of armed force of one state against the sovereignty, territorial integrity or political independence of another.[5] A *crime* of aggression entails 'the planning, preparation, initiation or execution (…) of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.'[6] Thus, despite being illegal, an illegal use of force is not a crime of aggression unless it is also a *manifest* violation of the UN Charter.

What this exactly entails and the various points of contention that lie in this provision is discussed throughout the next chapters, but for the purpose of introducing this book, it is important to note that scholarly literature provides two different readings of what happened in Kampala.[7] On the one hand we find a stream of literature that celebrates Kampala as a historic achievement and the crime of aggression as an important step towards addressing aggressive war. Much of this literature follows the legalist logic that with the crime of aggression, law has become better able to suppress the politics of states that commit aggressive war. In this legalist understanding, 'law' is popularly understood as a neutral set of rules that places bounds on the acceptable limits of state behavior, and 'politics' as the realm of the unrestrained free will of states. Whereas aggressive war was once unrestrained because it was up to states themselves whether

[5] Article 8*bis*(2) Rome Statute, which is an exact copy of the definition of aggression provided in *Definition of Aggression*, UNGA Res 3314 (XXIX) (14 December 1974).
[6] Article 8*bis*(1) Rome Statute.
[7] See Chapter 2 for a further discussion and referencing of these streams of literature.

they would resort to force, the reasoning goes, the regulation and criminalization of aggression has disciplined states such that they will refrain from resorting to force illegally and aggressively. This limits the space of (bad) politics through means of (good) law.

On the other hand, there is literature that puts forward a much more critical perspective on the capabilities of the crime of aggression amendment that was adopted in Kampala. This critical literature stream is made up of 'internal' and 'external' critics. Internal critique accepts the crime of aggression in principle but critiques aspects of the crime of aggression provision or its entirety. They tend to follow the legalist logic described above and some of them also view Kampala as 'historic achievement,' while arguing that a different provision would have been better able to address the problems identified. Instead, 'external' critique rejects the idea that the crime of aggression could be formulated in any way to achieve what legalists believe in: that law is able to tackle and trump the political. In this literature of external 'anti-legalist' critique, the 'realist' logic often emerges. According to 'realist' scholars, law is ill-suited as a means to suppress the political. This stream of literature points to the openness of the aggression norm and to the lack of 'legal power' it has to be enforced, and provides a critique of its ability to achieve much, if anything at all, in terms of restraining states in their choice of action. This realist critique particularly focuses on the inability of international law to restrain states from acting according to their interests. Like in the first logic, this literature places law opposite to politics, but in contrary direction as in the first logic of 'law trumping politics': instead, it views law as unable to restrain the political and hence as irrelevant as means to address the problem of aggressive use of force.

Two logics thus emerge from the literature. The legalist logic understands law as neutral and objective instrument to suppress arbitrariness that comes with politics, even if discussion continues on how exactly rules are best formulated to achieve such ends. The realist logic, on the contrary, rejects the idea that international law can restrain states ultimately, and holds that, even if international law may hold many positive traits and contributions, when it comes to the essential interests of states, politics trumps law.

Yet, neither of these two streams allows us to fully understand the following puzzle: if, as the realists contend, the amendment on the crime of aggression has so little to offer, why did states and other stakeholders fight so hard to achieve consensus on this issue and celebrate it as a successful outcome? And if, as the legalists argue, the definition of aggression represents a near global legal consensus, why does there remain such fundamental disagreement on the aggressiveness or legitimacy of use of force? Notwithstanding the existence of some widely agreed upon instances of aggression, such as the Nazi invasions throughout Europe and Saddam Hussein's occupation of Kuwait, more often than not situations of (potential) resort to force spark discussions that law in and of itself doesn't seem to resolve. The argumentative practices in recent events such as, for example, the 1999 NATO bombing campaign in

Belgrade, the 2003 US/UK invasion of Iraq, the discussions in and out of the Security Council on whether to intervene in Darfur, on whether and at what point a right to self-defense exists against states that increase their nuclear capability, on the scope of the right to self-defense against non-state actors including terrorists, on the interpretation of the Security Council authorization to use force against Libya, on whether or not to intervene in Syria, and on Russia's assistance in effectuating secession of Abkhazia, South-Ossetia, the Crimea and Eastern Ukraine, demonstrate that disagreements on where to draw the line between aggressive use of force and non-aggressive use of force continues.

As is further discussed in the next chapters, this disagreement continues because the regulation and criminalization of the notion of aggression stumbles again and again on the problem that there is fundamental disagreement on what *exactly* aggression is when it comes to concrete situations. The next chapters show that the notion of aggression is indeterminate, making any line or rule that is drawn to separate aggression from non-aggression contested in every aspect of its application.

The crime of aggression norm is indeterminate because the provision can be approached and used in fundamentally different ways, relying on fundamentally different underlying assumptions and leading to fundamentally differing positions or rationales for positions. In Chapter 4 it is discussed that the crime of aggression provision is open enough to be used to argue fundamentally different views on what aggression is. The crime of aggression rule distinguishes criminal from non-criminal behavior on the basis of what is deemed to be a 'manifest violation of the UN Charter.' This criterion invites contestation over the very nature of the international legal order. As was seen in the discussions on the adoption of the crime of aggression, which is further discussed in Chapter 4, there is fundamental disagreement on what is a *manifest* violation of the UN Charter. This contestation goes to the core question of how the international community that forms the UN is best to achieve the UN's primary goals of maintaining international peace and security. For example, whether peace and security is (best) maintained or restored by intervening to protect civilians against their regime and perhaps even change their regime in favor of another. Or whether the whole act of intervening, and thus engaging in war, is more destabilizing and lethal and thus is more harmful to peace and security. And assessments of this may vary according to the circumstances at hand. This leads to different views on whether a certain illegal use of force is legitimate and excusable and not a *manifest* violation of the UN Charter, or instead aggression.

This indeterminacy is not limited to interpretative battles over the purposes of the UN. More broadly, the term 'aggression' is flexible enough to include many different moral and political positions, some of which are diametrically opposed to one another. For example, some would see an intervention in Libya or Syria as a humanitarian intervention to protect civilians, while others would understand the same interventions as instances of powerful states seizing the opportunity to maintain

or increase their power (for example, by gaining control over oil resources). The former group would call such an intervention 'non-aggressive,' while the latter might insist that on its 'aggressive' character. Different understandings of world order and their different understandings of the relationships between the individual, the state and the international sphere lead to different answers to what aggression is. A same use of force can therefore be understood by one to be 'aggression' while another finds it humanitarian or even heroic. These different approaches to assessing whether use of force is aggressive or not vary according to, for example, worldviews, power and interest positions, values and morality, subjective perceptions of reality, and risk assessments. Because these different approaches rely on different assumptions that may contradict one another fundamentally, they lead to different understandings of what the role of the UN, states and individuals are, as well as of what values to protect, to what extent interests may justify using force (and which interests may and may not justify force), and how a situation and the risk that it worsens is understood. Different understandings of such factors may lead to different understandings of what a 'manifest violation' of the UN Charter is, and thus what constitutes a crime of aggression.

The crime of aggression is therefore open to its very core: a use of force can be regarded as a violation of the highest norms or, instead, as humanitarian bordering on heroism, depending on how one approaches and uses the provision. This openness in the norm is created because the notion of aggression attempts to accomplish two goals simultaneously: 1) it seeks to protect states against the aggression of others; and 2) it seeks to maintain states' own freedom to use force when justified as being for the 'good'. However, the meaning of 'the good' is essentially contested. Because of this, the crime of aggression can be used to argue mutually exclusive positions; to argue both A and non-A at the same time.

What is more, while legal practice disciplines what is and is not recognized as a legal argumentative strategy, what it does accept is not only internally contradictory, but also reinforces contradictions. Critical legal scholarship has shown that for the validation of a norm references are made to both what states have *consented* to (and thus on the basis of state will) and that there is at the same time a 'higher' normative framework that restrains states from what they want to do ('will') and thus separates the validity of the norm from state consent. Early thinkers tended to think that international law was natural law, given by God or in other ways given by nature. The problem was that such a law was inherently subjective.[8] Different people arrived at different conclusions on what the law 'said.' In response, in the 19th century, naturalism was more and more replaced by a more scientific-looking approach that was referred to as positivism. Positivism assumes that law is man-made and that it can be discovered by studying what states do. Yet, equaling law with what states do anyway loses law's normative force. Critical legal scholarship in the 1980s

[8] Jan Klabbers, *International Law* (Cambridge University Press, 2013), at 12-13.

demonstrated that law is actually constantly seeking a compromise between naturalism and positivism. As particularly David Kennedy and Martti Koskenniemi showed, international law needed to be both naturalist (and serving the common good) and positivist (serving state will) at the same time.[9] Conceptually, this is not possible. Either a rule binds because it is derived from state will (consent) or there is a legal validation beyond what states will and state consent does *not* bind. When conflict arises over the interpretation or application of a norm, either the reasoning that a claim is based on state consent wins or that it is based on something beyond state consent wins, but conceptually they mutually exclude each other as ultimate source on which the validity of a norm resides.[10]

Chapters 3 and 4 in particular show how this combination of consensual and non-consensual argumentation occurs in use of force discourse and the argumentative practice around the regulation and criminalization of aggression. For example, on the one hand it is claimed that humanitarian intervention without Security Council authorization is a crime of aggression because states have agreed that use of force is prohibited if it is not in self-defense or in pursuit of a Security Council authorization, as is reflected in the UN Charter (which is a consent-based argument). On the other hand, to make the argument more convincing, it is often buttressed with a non-consensual argument, such as that states have an inherent right to exercise sovereign rights over their territory, without interference from other states. Conversely, the argument that a humanitarian intervention is *not* a crime of aggression claims on the one hand that it is in line with a develop*ing* norm (meaning not reflecting consent (at least yet)) that international law protects/should protect individuals from human rights violations notwithstanding state sovereignty claims (which is a non-consent-based argument). On the other hand, in order to make this argument more convincing, they claim that this development can be identified in state practice (which is consent-based). Either argumentative strategy for or against humanitarian intervention as aggression tends to combine arguments that mutually exclude each other's validity claim: they combine consensual with non-consensual arguments. Yet, either the norm binds because it relies on state consent and the question is whether or not what states have consented to through treaties and customary international law provides that humanitarian aggression is or is not aggression, under whatever circumstances that may occur, *or* the norm binds because it relies on something beyond state consent and finds validity in a higher (non-state) source. In that case, the question is whether or not international law, as reflected in nature, morality or what may, provides a right to

[9] Jan Klabbers, *International Law* (Cambridge University Press, 2013), at 13; David Kennedy, 'Theses About International Law Discourse' (1980) 23 *German Yearbook of International Law* 353; David Kennedy, *International Legal Structures* (Nomos Publishers, 1987); Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, 2005).

[10] See for a thorough explanation of the indeterminacy in the deep structure of the legal argument, Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, 2005) and David Kennedy, 'Theses About International Law Discourse' (1980) 23 *German Yearbook of International Law* 353.

humanitarian intervention or not. Because legal practice instead accepts combinations of both consensual and non-consensual arguments, depending on whether a particular humanitarian intervention is aligned with one's own perception of the 'good,' one or the other reasoning is used that combines arguments based on state consent and of natural law or morality, and the intervention is claimed to be or not be a manifest violation of the UN Charter and thus a crime of aggression.

The crime of aggression is therefore indeterminate because the norm can be approached and used in contradicting ways, relying on fundamentally differing underlying assumptions that allow fundamentally differing positions that are buttressed with equally sound legal reasoning to co-emerge without any substantive guidance that the term 'aggression' holds to prefer one over the other. The crime of aggression therefore cannot adequately distinguish 'aggressive' from 'non-aggressive' behavior in the abstract because the norm does not provide such clarity for particular situations of use of force, nor does it provide a meta-criterion on the basis of which different viewpoints, values, interests and fairness can be weighed in light of the particular circumstances at hand.

However, even though the norm is indeterminate and inherently political, and I will argue *because* this is so, each and every one of these debates are held in *legal* language, invoking legal argumentation to claim one or the other position. These debates exclude argumentation that is not recognized as 'legal argumentation' and include argumentation that is.[11] The regulation and criminalization of the notion of aggression therefore has gained a certain amount of law's power and disciplining force. Dismissing law as irrelevant because inherently political therefore also does not provide a satisfactory understanding of the discourses and argumentative practices on the use of force and the crime of aggression.

The 1999 NATO bombing campaign on Serbia provides an example of how these two different understandings of the relationship of law and politics play out. On 24 March 1999, NATO started bombing campaigns on Serbia, 'Operation Allied Force', justifying this by claiming them to be necessary in order to end the violence that Serbs committed against Kosovar Albanians. The bombings ended on 10 June 1999 and led to the withdrawal of Serbian forces from Kosovo and the establishment of a UN mission in Kosovo, the United Nations Interim Administration Mission in Kosovo (UNMIK). The bombings killed around 500 civilians.[12]

[11] An example is provided by the difficulty that states that supported the NATO bombings in 1999 have had in responding to Putin's Crimea argumentation of 2014, in which the Russian President invoked the NATO bombings as precedent and argued in legal language that his intervention in the Crimea was lawful for protecting Russia's compatriots against the violence occurring in the Ukraine.

[12] Due to a lack of reliable official documents, the exact number of casualties is unknown. Human Rights Watch 'estimates that about 500 civilians were killed in approximately 90 incidents.' Amnesty International, *Federal Republic of Yugoslavia (FRY)/NATO: "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO during Operations Allies Force* (2000), at 1, note 2, cited in Martti Koskenniemi, ''The Lady Doth Protest Too Much.' Kosovo, and the Turn to Ethics in

Serbia condemned the attacks as aggression. The operations were not authorized by the UN Security Council. Nor were they allowed under the right to self-defense. A committee of prominent international law scholars and practitioners, the Independent International Commission on Kosovo, was created to consider the legality of NATO's bombings. It was convened by the Prime Minister of Sweden, Göran Persson, endorsed by then UN Secretary-General Kofi Annan, and co-chaired by Justice Richard Goldstone and Carl Tham. Their report concluded that the bombings were 'illegal but legitimate,' because, they concluded, there was no other way to stop the killings and atrocities in Kosovo.[13]

However, it remains unclear what 'illegal but legitimate' actually means. It is argued that the intervention was a humanitarian intervention, because it was intended to protect individuals against atrocities. However, despite scholarly contributions that argue to the contrary,[14] there is currently no legal basis in international law for recognizing a humanitarian intervention without Security Council authorization as an exception to the prohibition to use force.[15] Thus unable to conclude that the use of force was legal, the Kosovo Commission held that '[i]t was illegal because it did not

---

International Law' (2002) 65 *The Modern Law Review* 159-175, at note 8. The Independent International Commission on Kosovo likewise uses the estimate of 500 casualties as indicative. The Independent International Commission on Kosovo, *The Kosovo Report* (Oxford University Press, 2000), at 5.

[13] The Independent International Commission on Kosovo, *The Kosovo Report* (Oxford University Press, 2000).

[14] For instance Michael Reisman & Myres McDougal, 'Humanitarian Intervention to Protect the Ibos', in Richard Lillich (ed.), *Humanitarian Intervention and the United Nations*(University of Virginia Press, 1973), at 177. Reisman and McDougal argue that argue that humanitarian wars are not straightforward violations of Article 2(4) of the UN Charter since 'a humanitarian intervention seeks neither a territorial change not a challenge to the political independence of the state involved and is not only not inconsistent with the purposes of the UN but is rather in conformity with the most fundamental peremptory norms of the charter.' They argue that it is therefore 'a distortion to argue that it is precluded by Article 2(4).' Ciarán Burke argues that taking general principles of international law into consideration, a case for the lawfulness of humanitarian intervention can be made under certain circumstances, in Ciarán Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing, 2013). See also Antonio Cassese, 'Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 *European Journal of International Law* 23-30, although Cassese argues that even though resort to force may be justified from an ethical point of view and that a customary rule may emerge that would legitimize humanitarian intervention without Security Council authorization, he also submits that as a 'legal scholar' he observes that such interventions are 'contrary to current international law' (at 25).

[15] UN Secretary General, *Report of the High-Level Panel on Threats, Challenges and Change*, U.N. Doc. A/59/565 (2 December 2004) provides at para. 203 that '[w]e endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other largescale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.' It thereby explicitly provides that the responsibility to protect may only lawfully be exercised pursuant to a Security Council authorization. This was confirmed in paragraphs 138 and 139 of the UN General Assembly 2005 World Summit Outcome Document, UNGA Doc. A/60/L.1 of 15 September 2005. See also, for instance, Bruno Simma, 'Nato, the U.N. And the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1-22, at 6. However, Simma argues that even though humanitarian intervention without Security Council authorization is and will remain in breach of international law, the particular circumstances of a concrete case should influence not only the moral but also the legal judgment of such cases.

receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.'[16]

On the one hand the NATO example corroborates the legalists' argument, showing how law disciplined the political. The NATO actions were scrutinized by an advisory commission with the aspiration of providing a legal assessment, reprimanded to certain extent as being illegal, yet also justified to certain extent as 'legitimate' for their humanitarian aspirations. While some saw this as a balanced assessment of what occurred, others, including Serbia, rejected this construction and condemned the NATO bombings as aggression. This is a discussion about law, how to understand and interpret it, and how it applies, and its outcomes then provide guidance to states on what they can and cannot do. The effect of this can clearly be seen by the fact that discussions on using force are dominated by considerations of whether or not it is legal. Despite the US and UK conviction of the necessity or opportunity to intervene in Iraq in 2003, they went out of their way to find legal justifications for their actions, exploring the entire breadth of potential arguments claiming the legality of using force in Iraq. Moreover, the NATO bombings were gratefully used by Russia as a precedent for annexing parts of Georgia in 2008 and Ukraine in 2014. Differing opinions on the desirability of this disciplining power of law aside, 'the legal' in such debates works in or on 'the political:' it becomes a language in which politics is undertaken.

Yet, on the other hand, the NATO example also bolsters the realists' argument, demonstrating that law does *not* control or suspend the political. At the end of the day, states do exactly what they see fit, even if it is as flagrantly illegal as it was in the NATO situation, and they can support most activities with legal language to make them be perceived as lawful in the eyes of some. Even though the crime of aggression amendment as such did not exist at the time, the ICC Statute already included aggression as a (non-operative) international crime, the General Assembly had adopted a definition of aggression in 1974 that to a large extent is the same as the new ICC definition and easily captures the NATO bombings, and the UN had placed the collective fight against aggression at the core of its organization and the collective security system in 1945. Nevertheless, the 1999 NATO bombings occurred, as did the 2003 invasion of Iraq, and Russia's annexations, and various other situations, and because of the openness of the 'aggression' norm, sufficient legal argumentation is available to argue for and against the aggressiveness of such situations based on sound legal reasoning.

[16] The Independent International Commission on Kosovo, *The Kosovo Report* (Oxford University Press, 2000), at 4.

1.2 Argumentation

The main argument that is developed in this dissertation is that the discourse and argumentative practices on use of force and aggression demonstrate both the legalists' and the realists' arguments on the relationship between law and politics. On the one hand is the idea that law is able to discipline politics, that it binds and restrains states in their actions, and that it produces a legal framework that consists of rules that discipline what is and what is not an accepted argument. On the other there is the idea of law as an empty veil of politics, or in other words, that law is inherently and entirely political and therefore not able to restrain the political. Discussions often present these two understandings of the relationship between law and politics as a dichotomy, and both literatures tend to focus on disproving the other logic. However, this book shows how rather than a dichotomy, both of these conceptions of law/politics co-exist and are interdependent with one another.

As the next chapters show, discourse and argumentative practices show that the law on aggressive use of force is inherently political. It cannot overcome this by suspending politics and replacing it with an objective rulebook providing what is and is not aggression. That issue is and remains deeply contested, and this fundamental disagreement cannot be resolved by using the language of law. Nevertheless, this does not mean that law becomes valueless. Use of force discourse also shows, for example, that discussions on use of force have become almost exclusively legalized. Arguments of morality or political interest have been replaced by arguments that invoke one or another legal source. With this adoption of the legal language comes the power of law that disciplines what is and is not recognized as following the *legal* logic and as *legal* argument. Consequently, some positions loose merit, others gain standing. And because of this performative dynamic, new interpretations and arguments constitute new realities, which invites new contestation, leading to new positioning, and so the dynamic goes on and on. Therefore, there appears to be a certain (discursive) disciplining power in law even if this does not overcome fundamental substantive disagreement.

Moreover, the interdependence of these two logics leads to the proceduralization of norms on which there is fundamental substantive disagreement. When fundamentally contested issues are brought into the realm of law (usually with the aim of achieving more predictable, just and ordered situations through regulation), the fundamentality of the disagreement often bars the finding of substantive agreement. Instead, agreement is sought in procedures for how further work should be done. Throughout the regulatory history of the notion of aggression this phenomenon can be observed: in the treaties on aggression in the *Interbellum*, the creation of the League of Nations, the Permanent Court of Arbitration, the United Nations, the 1974 Definition of Aggression, the inclusion of the crime of aggression in the ICC in 1998, and the ICC's crime of aggression amendment in 2010. Each time, substantive disagreement on what aggression is and thus on where to draw the line between aggression and non-

aggression led to seeking agreement on procedures on how to deal with resolving such a dispute, but elsewhere than on the diplomats' table. It led to finding consensus on *how to* deal with it, rather than *dealing* with it.

Yet, legalization of a fundamentally contested issue without reaching substantive agreement may also entrench such disagreement by enforcing contested positions with the power of law. Disagreement is no longer the holding of a different view but becomes an alleged 'mistaken understanding' of the law. Moreover, the morality that comes from international criminal law's presentation as addressing crimes that are inherently criminal and blameworthy, *mala in se* crimes, and only the most serious of those, adds a further moral layer to this entrenched disagreement. Not only is the position of the other disagreed with and an alleged mistaken interpretation of the law, it also represents evil: it tries to justify a crime that belongs to the most serious crimes of concern to mankind, and a crime against all, *erga omnes*. This may further entrench contestation, which, for example, may make negotiated settlement or compromise even harder to find.

This research therefore identifies four materializations of the relationship of law and politics in the discourse and argumentative practices on the use of force and the regulation and criminalization of aggressive use of force:

1) that using legal language disciplines the political sphere to a certain extent;
2) that legalization and the use of legal language does not overcome the fundamentality of the disagreement over the deeply contested issue of what is and what is not aggressive use of force;
3) that the choice for seeking law's disciplinary force despite fundamental substantive contestation leads to proceduralization and the delegation of substantive disagreement elsewhere, to other *fora*; and
4) that this choice carries the consequence that disagreement may be entrenched through the power of legal language rather than resolved.

1.3 Analytical Positioning

This book does not advocate a normative agenda *for* or *against* the crime of aggression or propose a (better) legal provision that would tackle the challenges it identifies and discusses. It rather aims to provide an analysis of the nature, abilities and limitations of the crime of aggression that might contribute to the development of the international criminal justice field. It does so by taking a constructivist approach.[17] Constructivism refers to a (social) 'world of our making,' as one of its primary

[17] Leadings works in the constructivist tradition include Friedrich Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, 1989), and Nicholas Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (University of South Carolina Press, 1989).

theorists, Nicholas Onuf, entitled his most famous book on constructivism.[18] In the constructivist view, international law provides the framework and vocabulary that enables and facilitates international politics.[19] It constructs society. Rather than being objective, international structures function according to rules that are made and reproduced by human practices, on an inter-subjective rather than individual basis, as result of complex human interaction.[20] This research has therefore epistemologically been interested in the social construction of knowledge and ontologically with the construction of social reality. It moreover adopts an intersubjective rather than individual theory of action.

In keeping with this constructivist tradition, this book approaches the development of the normative framework of the notion of aggression as not confined to merely interstate action, but as being continuously (re)constituted and shaped through and in a wide range of interpretive communities. Applying Stanley Fish's theory of 'interpretive communities' to international law, Ian Johnstone wrote that 'interpretative authority (…) resides in neither the text nor the reader individually, but with the community of professionals engaged in the enterprise of treaty interpretation and implementation.'[21] With regard to the construction of the crime of aggression norm, these interpretive communities therefore not only consist of those diplomats and statesmen who called for a definition of aggression to guide the Security Council in addressing the problem of aggressive war, but also of those who argued for its recognition and codification as international crime; of those who invoke the concept to accuse others of committing aggression or to distinguish their own acts as non-aggressive; of scholars, civil society organizations, judges, and others who influence and contest what uses of force are or should be (il)legal and (il)legitimate, and which should be referred to as aggression and categorized as criminal behavior.[22]

The doctoral research on which this book is based focuses on the two main practices that have influenced the development of the 'aggression' norm, namely i) the discourse and argumentative practice on use of force in the collective security paradigm and ii) the process of regulating and criminalizing aggression. By focusing on what practitioners do rather than abstracting from the actual practices that shape the norm continuously, the analysis better accounts for the many ways in which the interaction between law and politics affects the normative framework around the notion of aggression and the ways in which the notion of aggression is used in

[18] Nicholas Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (University of South Carolina Press, 1989).
[19] Jan Klabbers, *International Law* (Cambridge University Press, 2013), at 16.
[20] Stefano Guzzini, 'A Reconstruction of Constructivism in International Relations' (2000) 6 *European Journal of International Relations* 147-182, at 154-155.
[21] Ian Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities' (1991) 12 *Michigan Journal of International Law* 371, at 372; Stanley Fish, 'Interpreting the Variorum' (1976) 2 *Critical Inquiry* 465-485.
[22] Marlies Glasius for instance wrote on the crucial role global civil society, which she defines as 'people organising to influence their world,' as a driving force in the establishment of the International Criminal Court and the use of the language of international criminal law to address conflicts, in Marlies Glasius, *The International Criminal Court. A Global Civil Society Achievement* (Routledge, 2006).

practice: both in use of force discourse and discussions around whether or not a situation constitutes a crime of aggression that could fall under the scope of the ICC Statute. International relations scholarship has recently seen a significant increase in focus on practices as a way to account for the many faces of world politics in action.[23] In the study of international relations, poststructuralists like James Der Derian and Ian Shapiro built on the work of, among others, Michel Foucault, and demonstrated that the complex pictures of world politics is an interaction of innumerable practices that are often overlooked in scholarly research. [24] Moreover, international relations theorists increased their focus on practices,[25] deeds,[26] and practical reasoning.[27] This has also been taken up by a number of international relations and legal scholars who found this practice-oriented approach useful in understanding the interaction of law and politics, and thus for understanding of law as such.[28]

The line drawn in the midst of social reality that separates 'subjective' politics from 'objective' law does little to account for the far more complex relations between law and politics in society. Rather than separating the study of law from its neighboring discourses of social description and political prescription, this research takes the approach of deconstruction to bring out the dependence of the language of international law on differing and contestable assumptions. Martti Koskenniemi and other scholars from Critical Legal Studies have demonstrated the problem of understanding law and legal argument as producing the objective resolutions it claims

[23] Emanuel Adler & Vincent Pouliot, 'International Practices' (2011) 3 *International Theory* 1-36, at 2.
[24] Emanuel Adler & Vincent Pouliot, 'International Practices' (2011) 3 *International Theory* 1-36, at 2; James Der Derian & Michael Shapiro (eds.), *International/Intertextual Relations: Postmodern Readings of World Politics* (Lexington Books, 1989).
[25] For example Stefano Guzzini, 'A Reconstruction of Constructivism in International Relations' (2000) 6 *European Journal of International Relations* 147-182.
[26] Nicholas Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (University of South Carolina Press, 1989).
[27] Friedrich Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, 1989); Christian Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations* (Princeton University Press, 1999).
[28] See for example Friedrich Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, 1989); Wouter Werner, 'The Changing Face of Enmity: Carl Schmitt's International Theory and the Evolution of the Legal Concept of War' (2010) 2 *International Theory* 351-380; Nikolas Rajkovic, ''Global Law' and Governmentality: Reconceptualizing the 'Rule of Law' as Rule 'through' Law' (2012) 18 *European Journal of International Relations* 29-52; Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, 2005); Jutta Brunnée & Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010); Antje Wiener, *The Invisible Constitution of Politics: Contested Norms and International Encounters* (Cambridge University Press, 2008); Anna Leander, 'Practices (Re)Producing Order: Understanding the Role of Business in Global Security Governance', in Morten Ougaard & Anna Leander (ed.), *Business and Global Governance*(Routledge, 2009), pp. 57-77, at ; Jörg Friedrichs & Friedrich Kratochwil, 'On Acting and Knowing: How Pragmatism Can Advance International Relations Research and Methodology' (2009) 63 *International Organization* 701-731; Tanja Aalberts, *Constructing Sovereignty between Politics and Law* (Routledge, 2012).

to bring.[29] In similar vein, this research focuses on disentangling argumentative practices into the various interpretations they accommodate, and into assumptions that underlie them.

Moreover, the study attempts not to abstract argumentative practices from their context but to historicize them and understand them as part of a social process. Arguments are thereby seen not only as products of their context but also as performative and constitutive for normative development. Following Wittgenstein's later work, language is understood as not merely attempting to describe reality but also as bringing about a particular reality. The meaning of language and thus of law is produced through practice and is contingent upon the context in which it is used.[30]

This approach is taken to try to understand not only the meaning that is given to the notion of aggression but also its performative and constitutive aspects. It aims to not only highlight the legal developments that arose from the process of legalizing and criminalizing the notion of aggression, but also the political function of language in how it enables certain actions and makes those obvious and rational, and disables alternative options, or makes them less obvious or rational.[31] More specifically, the research project studies what is constructed, how it is constructed and what reasons are invoked for regulating and criminalizing the notion of aggression and for the particular way in which it is done. It moreover studies the ways in which the notion of aggression is invoked in practice and how states use it, the consequences that follow from criminalizing aggression, the criminal law norm that is created, how this might play out in a criminal court of law, and the politics that is generated by attempting to suspend politics through regulation and criminalization.

1.4 Methodology and Outline

The main questions for this research are, first, how the Kampala crime of aggression amendment came into existence and came to be constructed as it was. And second, in what ways law and politics relate to one another and co-constitute each other in the construction of the crime of aggression. To answer these questions, the research focuses on the two main practices in which the notion of aggression is (re)constituted and shaped. The first consists of the argumentative practice on the legality of use of force. The second is the practice of the regulation and criminalization of the notion of aggression in diplomatic *fora* and tribunals.

[29] See in particular Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, 2005) and David Kennedy, *International Legal Structures* (Nomos Publishers, 1987).
[30] Ludwig Wittgenstein, *Philosophical Investigations* (Prentice-Hall, 1958).
[31] As discussed in, and see for further discussion, Tanja Aalberts, 'Sovereignty', in Felix Berenskoetter (ed.), *Concepts in World Politics*(Sage, 2015), at

Before delving into these practices in more detail, the methodology for Chapter 2 consists primarily of literature study into the different ways in which scholarship conceptualizes the relationship between law and politics. On the basis of a review of literature on the regulation and criminalization of aggression and literature of international relations and legal scholarship on the relationship between law and politics, Chapter 2 formulates the analytical framework for the rest of the research. Informed by the theses that are developed in the next chapters, Chapter 2 also introduces the four manifestations of the law/politics interplay that are traced and discussed throughout the book: discipline, indeterminacy, proceduralization, and entrenchment of contestation.

For Chapter 3, the methodology consists of a discourse analysis of the argumentative practices on the legality of use of force. The crime of aggression criminalizes what use of force is deemed illegal and, by its character, gravity and scale, a manifest violation of the UN Charter.[32] Understanding what the crime of aggression criminalizes therefore requires a study into what is currently considered illegal use of force and a manifest violation of the UN Charter. This part of the research consists, firstly, of a study into historical thinking about the legality of use of force and the emergence of the notion of aggression in historic scholarship. This focuses particularly on the two main traditions that arose in Europe in the period following the late medieval ages: the just war tradition and the tradition that regards war as an institute of law. International law as we know it is widely understood to have started in the 17th century.[33] Before, international rules also existed but with the emergence of the modern state system in Europe, states realized the benefits of developing a specific legal system to organize their relations. This study is therefore Eurocentric, but these traditions are widely regarded as having been the most influential traditions in the development of this undeniably Eurocentric use of force paradigm, despite its global aspirations and reach.

Secondly, the research on use of force discourse includes a study into the historical roots of the contemporary use of force paradigm, referred to as the 'collective security system,' its development throughout the 20th and early 21st century, and the emergence of the 'responsibility to protect'-doctrine. To this end, the approach taken is to study the legal sources that underpin the UN system and how these legal concepts are invoked in state practice and discussed and interpreted in literature. The collective security system and its development since 1945 provides the normative, institutional and political framework through which arguments about using force are forged, and is therefore indispensable for an understanding of use of force discourse and consequently also of the notion of aggression.

Thirdly, the research on use of force discourse analyzes the argumentative structures that are invoked in contemporary situations in which force is used or its consideration

[32] Article 8*bis* Rome Statute.
[33] See for instance Jan Klabbers, *International Law* (Cambridge University Press, 2013), at 4.

is discussed openly. The research focuses on the situations in which force was used or openly considered to be used, that were of sufficient gravity and meeting the requirement of being between states, which is required to potentially reach the scope of the definition of aggression. Particular focus is given to contemporary situations because the crime of aggression will be interpreted from the position of contemporary practice. Therefore, argumentative strategies used for situations from the late 1980s onwards, and particularly those since the beginning of the 21st century, have been studied to understand the parameters of the contemporary use of force paradigm, on which the crime of aggression norm relies. Indeed, the crime of aggression criminalizes what use of force is deemed illegal as well as a manifest violation of the UN Charter by its character, gravity and scale. Because the definition of aggression as it is developed excludes use of force in internal situations and excludes non-armed force and force that does not reach a certain gravity threshold of scale and effects, the research focuses on situations that could arguably fall within the scope of the crime of aggression. Yet, if the argumentative strategies invoked a legal concept that would allow the use of force to become regarded as aggression nevertheless, the situation is included. For example, even though the notion of aggression seems to exclude force used by non-state actors when not attributed to a state, because states have resorted to force against such non-state actors invoking self-defense, and arguing that self-defense is also allowed against non-state actors, these situations are included too. This analysis seeks argumentative patterns and underlying assumptions for argumentation to comprehend on what legal conceptualization of the use of force the crime of aggression is supposed to rely.

Through this research into the use of force discourse, Chapter 3 traces the historical roots of the contemporary collective security system and contemporary argumentative strategies to a historical move between the 'just war'-tradition and the 'war as institution of law'-tradition. Even though both rely on contradicting assumptions, both have been fused together in the contemporary collective security paradigm. On that basis, the chapter analyzes how the openness and disciplining force of the normative framework on use of force materializes in the paradoxical developments of the responsibility to protect doctrine and the crime of aggression at the same time and the fundamental disagreements that occur in practically all use of force situations on the legality, legitimacy and aggressiveness of use of force.[34]

[34] As Buchanan and Keohane explain, the term 'legitimacy' can be used as normative legitimacy and sociological legitimacy. Normative legitimacy points to the moral authority an institution such as a court has to concern itself with the situation, such as a case, at hand. Sociological legitimacy is about the *acceptance* of moral authority of the institution, court, trial, verdict, norm and interpretation and application of a norm, for example. It is thus an empirical question. See Allen Buchanan & Robert O. Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 *Ethics and International Affairs* 405-437. See also Marlies Glasius & Tim Meijers, 'Constructions of Legitimacy: The Charles Taylor Trial' (2012) *The International Journal of Transitional Justice* 1-24, at 3-4. This book uses the term 'legitimacy' mostly in the sociological sense. It uses it for instance to discuss the issue of whether a use of force is regarded to be legitimate, and therefore not aggression even if it is illegal, or whether the illegal use of force is seen as aggression. Moreover, the book discusses for instance with regard to

The methodology for Chapter 4 is a discourse analysis of the process of regulating and criminalizing the notion of aggression. This is predominantly focused on the discussions that took place in diplomatic settings but also includes the few instances in which the crime of aggression has been adjudicated. This part of the research entails a study of the trial records of the Nuremberg and Tokyo Tribunals, as well as the diplomatic processes that led to their creation. Moreover, the research studies the diplomatic processes that led to the creation of the UN and subsequent working groups that were mandated to define aggression, as well as those of the International Law Commission, in setting up the ICC in the 1990s and the subsequent defining exercises by the working groups that eventually led to the 2010 Kampala compromise. It studies both the public records of these diplomatic processes and secondary literature on these negotiations.

These investigations benefited from the author's attendance at the final two weeks of negotiations on the crime of aggression amendment during the ICC Review Conference in Kampala, as well as subsequent diplomatic meetings of the Assembly of States Parties of the ICC. This field research allowed discussions and informal interviews with members of various delegations, which gave additional insight into the rationales and interpretations that existed among the various delegations.

As Chapter 4 discusses, this research into the adjudication, regulation and criminalization of the notion of aggression shows how throughout the process of regulating and criminalizing aggression the different understandings of law/politics continuously re-emerge and create similar discussions and similar barricades. Moreover, every time substantive disagreement cannot be solved because disagreement over what aggression exactly is remains fundamental, similar solutions are sought in terms of trying to find agreement on procedural rules instead and thereby delegating the substantive decision elsewhere. Meanwhile, 'elsewhere' the same substantive contestation re-emerges and the same dynamic repeats itself.

After Chapter 4 has set out the specificities of the crime of aggression amendment, Chapter 5 analyzes this provision by deconstructing it into the different legal frameworks from which it borrows and which it combines: public international law, criminal law and human rights law. A research into the fundamentals of those legal frameworks shows how elements of each emerge in the crime of aggression amendment. This part of the research takes a detailed look into the various and contradicting rationales that each of these legal frameworks holds, and analyzes the legal construct that emerges from combining those. It shows how the crime of aggression amendment relies on both horizontal (between equals) and vertical (between unequals) rationales, and that this provides a confusing and contradicting picture for what the norm is supposed to do.

---

the critique of whether a fair trial is possible that this provides tensions for the legitimacy of the institution in achieving its self-proclaimed goal of enacting moral authority.

Given these observations, Chapter 6 discusses how a crime of aggression case would play out in the ICC. By shifting the fundamental substantive disagreement on aggression off the diplomats' table and onto the judges' bench, adjudicators are placed in the position of deciding in the absence of clear legal guidelines, fused with contradicting assumptions, each pointing in opposite directions. This not only inherently politicizes the ICC, but asks judges to make choices about contested concepts while concealing the questions that they are to answer in legalist terms, keeping up the appearance that the decision is in fact based on an objective rule, in order to justify applying the criminal law apparatus. Moreover, this chapter discusses with what rational defense strategies this leaves the accused, having little to gain from participating in the trial as it is set out, but more from turning the trial into a spectacle.

Chapter 7 furthers this exploration of legal and political consequences from the regulation and criminalization of aggression by focusing on the ways in which the observed dynamic of proceduralization entrenches contestation rather than resolves it, and the particular kind of politics that this generates. The turn to law in pursuit of (the ideology of) legalism to suppress the politics of the question of the legitimacy of war does not suppress politics and, paradoxically, also generates it in a different form by labeling the opponent as enemy and criminal. It provides sides to a conflict with a language that leads to rather uncompromising positions, claiming to uphold the (only) right and just one, against which only evil unites. This chapter discusses that unless such a position is indeed widely agreed upon, which it is often not as numerous debates on the legitimacy of force illustrate, the criminalization of aggression may lead to an entrenching of positions, a morality politics of the righteous, and provides a powerful instrument to conduct lawfare, rather than bringing positions nearer each other.

Chapter 8 concludes and brings together the four manifestations of the relationship of law and politics that were observed in the discourse of use of force and the process of regulating and criminalizing aggression by discussing the conclusions of this research in the context of the Russian intervention in Ukraine in 2014 and 2015. It closes by suggesting an introspection into the politics that the international criminal justice field represents and generates, into the choices it makes, and into the expectations it raises.

2. THE CO-CONSTITUTION OF LAW AND POLITICS

The literature on the crime of aggression amendment to the ICC provides three different readings of what happened during the ICC Review Conference in Kampala and the negotiation process leading to it. While some scholars celebrate it as historic success and the culmination of a century-long process of criminalizing aggression,[35] a second group criticizes the amendment for (aspects of) its formulation while not rejecting the idea of a crime of a aggression amendment as such,[36] and a third group

[35] See for example, Benjamin B. Ferencz, 'Aggressive War: The Biggest Crime against Humanity' (2011) 43 *Studies in Transnational Legal Policy* 31-57 stating that 'the progress has been fantastic.' The motto on his website reads 'Law. Not War' and in his many writings on aggression, Ferencz suggests that law is the way to address, prevent and deter aggressive war; former ICC Vice-President Hans-Peter Kaul submitted that had the crime of aggression not been recognized in the ICC Statute, '[t]his would have been a triumph for all those who continue to argue that it is simply impossible to regulate power politics and the use of military force through norms of law,' cited from his address at the 4th International Humanitarian Dialogs 'Crimes against Peace – Aggression in the 21st Century' at the Chautauqua Institution, on 30 August 2010, entitled 'From Nuremberg to Kampala – Reflections on the Crime of Aggression,' and in Hans-Peter Kaul, 'From Nuremberg to Kampala - Reflections on the Crime of Aggression' (2011) 43 *Stud. Transnat'l Legal Pol'y* 59-84, where he called the crime of aggression amendment 'a giant step forward'; Stefan Barriga, 'Negotiating the Amendments on the Crime of Aggression', in Barriga & Kress (ed.), *The Traveaux Préparatoires of the Crime of Aggression*(Cambridge University Press, 2012), pp. 3-57, at (calling the crime of aggression amendment 'without a doubt a historic achievement'); Christian Wenaweser, 'Reaching the Kampala Compromise on Aggression: The Chair's Perspective' (2010) 23 *Leiden Journal of International Law* 883, at 883-887 ('to finish the one task that states parties had left over from the Rome Conference int he best interest of the International Criminal Court, but also to make, collectively, a big step to advance international criminal law'); Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2013) ('It was a portentous moment. The decision to criminalise State acts of aggression marks a significant step in ending the impunity that has so long shadowed the illegal use of inter-State armed violence'); Niels Blokker & Claus Kress, 'A Consensus Agreement on the Crime of Aggression: Impressions from Kampala' (2010) 23 *Leiden Journal of International Law* 889-895 ('historic achievement'); Claus Kress & Leonie von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 *Journal of International Criminal Justice* 1179-1217 ('exceeds expectations one could have'); David Scheffer, 'States Parties Approve New Crimes for International Criminal Court' (2010) 14 *ASIL Insights* ('historic milestone'); Astrid Reisinger Coracini, 'The International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression – at Last… in Reach… over Some' 2 *Goettingen Journal of International Law* 745-789 ('important step for international criminal justice'; 'success'); Jennifer Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference' (2011) 11 *International Criminal Law Review* 49-104 ('historic'; 'solid achievement').

[36] See for instance Sean Murphy who raises concerns for the legitimacy of the norm due to its lack of determinacy and little clarity in the line being drawn between aggressive acts which are criminal and those which are not as well as that therefore the norm-refinement will take place under the auspices of the ICC prosecutor and a few judges. He does, however, imply that a different definition would be better able to address the concerns he raises, Sean D. Murphy, 'Aggression, Legitimacy and the International Criminal Court' (2009) 20 *European Journal of International Law* 1147-1156; Mark Drumbl, who argues that in order to achieve (and push for) consensus a narrow definition is adopted, so that the crime of aggression for instance only applies to a narrow category of those in leadership positions, which suspends the momentum for the conversation about what exactly aggression should proscribe, in Mark A. Drumbl, 'The Push to Criminalize Aggression: Something Lost Amid the Gains?' (2009) 41 *Case Western Reserve Journal of International Law* 291-319 and Mark A. Drumbl, "Germans Are the Lords and Poles Are the Servants': The Trial of Arthur Greiser in Poland, 1946' (2013) *Washington & Lee Legal Studies Paper No. 2011-20* ; Mauro Politi, who points at the 'unfinished work' that Kampala left in further determining what aggression is and that it needs to apply

dismisses the whole idea of a crime of aggression amendment as inherently problematic, vague, open, indeterminate or otherwise dubious as a criminal legal norm.[37]

These divergent readings can be explained by the authors' different assumptions about the relationship between law and politics. Understanding the Kampala literature as such is a categorization in ideal types. Not all authors fit one or another of these ideal types exactly. However, the point here is not to categorize literature as such, but to analyze that different assumptions of the law/politics-relationship lead to different understandings of what happened in Kampala and of what to expect from the crime of aggression.

---

also to non-state actors and non-state parties, that the definition as it stands is problematic for judges to deal with, and that the definition makes it problematic for the Court to be effective, yet doesn't dismiss the idea that this is possible, Mauro Politi, 'The Icc and the Crime of Aggression. A Dream That Came through and the Reality Ahead' (2012) 10 *Journal of International Criminal Justice* 267-288; and Marko Milanovic, who raises a number of concerns regarding the crime of aggression's treatment of the principle of legality, Marko Milanovic, 'Aggression and Legality. Custom in Kampala' (2012) 10 *Journal of International Criminal Justice* 165-187.

[37] See for example Michael Glennon who argues that the crime of aggression conflicts with basic human rights norms such as the legality principle because the norm is inherently vague which is due to unresolvable political and cultural differences. He argues at 101 that a 'statute permitting the prosecution of only clear-cut, blatant instances of "impropriety" would still be vague. This is the central difficulty in seeking to eliminate vagueness merely by announcing that marginality is excluded: it is impossible to know from the terms at issue what within their reach is marginal and what is essential,' Michael J. Glennon, 'The Blank-Prose Crime of Aggression' (2010) 35 *The Yale Journal of International Law* 71-114; Andreas Paulus who also points to the inherent indeterminacy of the definition of aggression, its uncertain application to recent cases concerning the use of force, the involvement of the Security Council in the exercise of jurisdiction, and the danger of concentrating issues of *ius in bello* and *ius contra bellum* in one single court or tribunal, Andreas Paulus, 'Second Thoughts on the Crime of Aggression' (2009) 20 *European Journal of International Law* 1117-1128; and Martti Koskenniemi, who connects the indeterminacy of the crime of aggression to the indeterminacy or unpredictability of the world in which it is supposed to operate and thus to the inherent weakness of such rules, Martti Koskenniemi, 'A Trap to the Innocent…', in: Claus Kress & Stefan Barriga (eds.), *The Crime of Aggression – A Commentary* (Cambridge University Press, 2016 (forthcoming)). Although Julius Stone has not lived long enough to criticize the Kampala crime of aggression amendment, his critique of the 1974 definition of aggression could apply in similar vein to Kampala. In Julius Stone, *Conflict through Consensus: United Nations Approaches to Aggression* (Johns Hopkins University Press, 1977), Stone submitted that it is 'understandable that instant recognition of 'aggression' could be a useful trigger of voluntary cooperation of states, a definition of aggression which would ensure such instant recognition is rather unattainable, and may even not be worth searching for,' at 16. Stone argued that an international criminal court with jurisdiction over aggression could only fail because it would attempt to limit a state's freedom precisely at its most obdurate point, to the core of state survival, and that while the drive to standing jurisdiction is both ethically and psychologically strong, it has also shown itself as politically and diplomatically impotent, at 163. Kai Ambos takes an approach that could arguably be described as external critique as well, submitting that the crime of aggression is inherently open if and as long as it is not possible to clearly delimitate the lawful from the unlawful use of force, which he doesn't think would have been possible because of fundamental contestation of what separates one from the other. He concludes, however, that Kampala was a success by achieving to reconcile conflicting views and by at least excluding situations that are deeply contested from likely emerging before the ICC at all, since a more exact definition would not have been possible anyway. He does submit that it is highly controversial whether Kampala achieved a workable and legally satisfactory definition, in Kai Ambos, 'The Crime of Aggression after Kampala', in *German Yearbook of International Law*(Duncker & Humblot, 2010), pp. 463-511, at .

Much of the celebratory literature as well as many of those providing 'internal' critique (rejecting or criticizing *this* crime of aggression but not the idea as such) follow a legalist logic that with the crime of aggression, law is better able to suppress the politics of states that commit aggressive war. In this legalist understanding, 'law' is popularly understood as a neutral set of rules that place bounds on the acceptable limits of state behavior, and 'politics' is the unrestrained free will of states. Whereas aggressive war was once unrestrained because it was up to states themselves whether they would resort to force, the reasoning goes, the regulation and criminalization of aggression has disciplined states such that they will refrain from resorting to force illegally and aggressively. This limits the space of (bad) politics through means of (good) law.

On the other hand, there is literature that puts forward a much more critical perspective on the capabilities of the crime of aggression amendment that was adopted in Kampala. The critical literature stream that articulates 'external' critique rejects the idea that the crime of aggression could be formulated in any way to achieve what legalists believe in: that law is able to tackle and trump the political, that the crime of aggression amendment will restrain states from resorting to force and provide the international community with the tools to end impunity for those resorting to force aggressively. External critique to the crime of aggression amendment points to the openness or indeterminacy of the aggression norm and to the lack of 'legal power' it has to be enforced, and provides a critique of its ability to achieve much, if anything at all, in terms of restraining states in their choice of action. This anti-legalist critique particularly focuses on the inability of international law to restrain states from acting according to their interests. Like in the legalist logic, this literature places law opposite to politics, but in contrary direction as in the first logic of 'law trumping politics': instead, it views law as unable to restrain the political and hence as (largely) irrelevant or misunderstood as means to address the problem of aggressive use of force.

While it is not clear in all literature on Kampala what view of the relationship between law and politics is assumed, the external critique stream of literature tends to follow an 'anti-legalist' logic that bears to a certain extent similarities to a 'realist' logic, arguing that law is ill-suited as a means to suppress the political. However, I would not argue that all authors that express external critique to the crime of aggression would be 'realists.' The further discussion of these logics follows the ideal types which is therefore not necessarily directly or in full applicable to every individual author on Kampala that is referred to above. Much of this critique follows a logic that closely resembles realist critique. However, since not all of those scholars follow this critique to the same conclusions as realists do, namely that international law is therefore irrelevant in restraining states in their behavior, I do not want to categorize those expressing 'external' critique as *being* 'realists' even if I discuss this ideal type as a 'realist' logic. I therefore use the terms 'anti-legalist' logic or 'realist' logic interchangeably where it comes to this particular position of what law can and cannot

bring vis-à-vis the political, but do not claim that those adopting this critique are hold a 'realist' view of international relations, understanding world order as an anarchical power struggle, each state fighting for its own interests and power positions, accepting international law only when and to the extent that it is perceived to contribute to national goals, and rejecting it when found to counter essential interests. Here, the point is not to analyze those expressing external critique of Kampala to their worldviews as realist or not, but to identify different understandings of how law and politics relate to one another with respect to the crime of aggression amendment that was adopted in Kampala.

'Legalists' see the crime of aggression amendment as a means of suppressing the (bad) politics of states that commit aggressive war by limiting their freedom of action. 'Anti-legalists' or 'realists' assert that the openness of the aggression amendment provides states with ample political space to remain largely unrestrained in their activities, and that any attempt to claim otherwise would entail turning the criminal law provision into an authoritarian tool that would require a select number of judges to make the political choices the provision itself leaves open. Legalists follow the logic that international law is an instrument for suspending politics, that law is objective vis-à-vis the subjectivity of politics, and neutral. They portray politics as external to law, as something that needs to be limited or overcome by acting on the basis of pre-existing rules and principles.[38] Realists deny this idea of 'speaking law to power' and maintain that when it comes down to vital interests, international law always succumbs to the force of politics.

These two logics are usually placed opposite each other, understood as a dichotomy, each aiming at discrediting the other. However, analyzing the discourses and argumentative practices on use of force and aggression shows that neither logic fully explains state behavior, yet neither can entirely be dismissed either. Placing them opposite each other is therefore a false dichotomy: the relationship between law and politics is more complex than a simple either/or.

It is impossible, and also unnecessary for the purpose of this book, to comprehensively define 'law' and 'politics.' However, as the discussion on the nature of the crime of aggression inherently interacts with the relationship between law and politics, some remarks are due in order to describe how these terms are used in this discussion on the aggression discourse. I understand 'law' to be an argumentative practice in which a specific language, or grammar, is used to contest other, differing views. The recognition of an argument as legal depends on whether it can successfully claim validity through the following of certain recognized procedures. The recognition of certain arguments as legal and others as non-legal relies on the use of this specific 'legal' language, and thus distinguishes certain types of argumentation from non-legal arguments, such as moral (good or bad), aesthetic (beautiful or ugly)

[38] See for an analysis of this legalist position, Sarah Nouwen & Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941-965, at 942.

or economic (profitable or not) arguments, by claiming its basis in what is recognized as a valid legal source.

Yet, when it comes to the sources of international law, although mostly presumed as a system that is ultimately rooted in the consent and practice of states, few international lawyers deny the existence of some minimum core of pre-given norms altogether.[39] International legal practice allows legal arguments not only to oscillate between consent- and practice-based legal sources and various interpretations thereof, but also between these sources and what can be called natural law or peremptory norms: norms that have binding power derived from a 'higher' source than mere state consent and independent thereof.[40] However, either law binds because it is based on the consent of states, or it binds because there is a higher source of law that overrules state consent, but it cannot derive validity from both, as they appear mutually exclusive. Because the practice of international law recognizes both types of sources, and, as Koskenniemi demonstrated, in fact structurally combines such mutually exclusive types of argumentation, international law is indeterminate into its deep structure.

Yet, even though international law has its limitations in substantive determinacy and enforcement, the next chapters show that it does restrain power to some extent. For example, law disciplines what arguments are recognized as legal and as holding persuasive force, it normalizes situations that are accepted as 'lawful,' it condemns deviant behavior as illegal, it enforces against such behavior, which certain substantive areas of international law hold larger enforcement capabilities for than others, and law disciplines actors to formulate their arguments in legal terms rather than a-legal terms.

'Politics' or 'the political' is usually not defined but instead contrasted to other spheres that are presumed to be non-political, such as economy, morality and law. One way to distinguish political action from other types of social action is to understand the political as a sphere where social interaction is particularly intensive. As Otto Kirchheimer articulated, '[s]omething is called political if it is thought to relate in a particularly intensive way to the interests of the community.'[41] This book therefore does not understand politics as the negative counterpart of law. As Morgenthau noted, '[t]he conceptual counterpart of the political is formed by the non-

[39] See for a further discussion and for how this plays out in the security discourse, Wouter Werner, 'Security and International Law: Between Legalism and Securitisation', in Philipe Bourbeau (ed.), *Security: Dialogue across Disciplines*(Cambridge University Press, 2015), at

[40] See for a deconstruction of various legal argumentations to their invocation of sources in particular Chapter 5 in Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, 2005)

[41] Otto Kirchheimer, *Political Justice. The Use of Legal Procedure for Political Ends* (Princeton University Press, 1961), at 25.

political but not by the concept of "legal question" which, for its part, can be both political and non-political.'[42]

Carl Schmitt understood the political as being ultimately about the act of distinguishing between friend and enemy. He observed that collectivities have external 'friends' (allies) and 'enemies' (in the sense of the other and the stranger, the *Feind* rather than foe).[43] Because the enemy is existentially something different and alien, conflicts with one's enemy are *possible* in extreme cases, even to the extent of war. Armed conflict is thus an ever-looming possibility, but not a situation that will ideally or necessarily come to pass. For Schmitt, because armed conflict is always a possibility, behavior of states ('the political') is determined by this possibility.

While it is hard to understand the political without accepting Schmitt's thesis on the friend-enemy distinction, this book takes a view of politics that is broader than merely the friend-enemy distinction. It includes also, for example, the constitution of an internal polity and the process of bringing together socio-political views on society in policy to govern the political community.[44] However, as Nouwen and Werner observed, even such broader conceptions of the political need to acknowledge that communities constantly need to make friend-enemy distinctions.[45] It follows that although it is difficult to define 'politics' precisely, what is relevant to this thesis is that politics entails disagreement, which can be highly intense, even to the point of there being a willingness to resort to armed force against those perceived as enemy and thus threatening one's way of life. Sketching the parameters as such, this book uses the term 'politics' in the way that in the international sphere, absent central authority and, like in any plurality of people, subject to a plurality of values, morality, interests, and images of reality, 'the political' forms the sphere in which states, international institutions, peoples, private entities and individuals interact, contest other views, with or without appealing to law, and with or without using legal argumentation and the legal language as an instrument to persuade others of one's own position, where it concerns issues that are believed to have reached a certain level of intensity regarding the interests of those involved.

---

[42] Hans Morgenthau, *Die Internationale Rechtspflege, Ihr Wesen Und Ihre Grenzen* (Noske, 1929), at 62. The translated quotation is taken from Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), at 442.

[43] Carl Schmitt, *The Concept of the Political: Expanded Edition* (The University of Chicago Press, 2007), at 26. For Schmitt, the essence of the political lay in this distinction between friend and enemy. This antithesis distinguishes between the utmost degrees of intensity of a union or separation. Schmitt explained that the enemy is not necessarily morally evil or an economic competitor. The antithesis of the political and its friend-enemy distinction is independent from other distinctions such as moral (good-evil), aesthetic (beautiful-ugly) or economic (profitable-unprofitable). The morally evil, ugly and economic competitor can be one's friend; the morally good, beautiful and economic trading partner can be one's enemy.

[44] See for a similar treatment of the political as indebted to Schmitt's insights but taking a broader, or as they submit 'less essentialist,' view of politics Sarah Nouwen & Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941-965.

[45] Sarah Nouwen & Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941-965, at 945.

This chapter formulates the analytical framework for the rest of the book, based on a review of literature on the regulation and criminalization of aggression and literature of international relations and legal scholarship on the relationship between law and politics, as well as the results from the research into the use of force discourse (discussed in more detail in Chapter 3) and into the regulation and criminalization of the notion of aggression (discussed in more detail in Chapter 4). Informed by the theses that are developed in the next chapters, this chapter introduces the four manifestations of the law/politics interplay that are traced and discussed throughout the book: discipline, indeterminacy, proceduralization, and entrenchment of contestation.

2.1 From Discipline to Indeterminacy…

Particularly after WWII, reflections on legal theory and legal research methods were often deemed irrelevant and rejected in favor of technical-legal problem solving. Fashionable scholars studied what the law proscribes and the right application of law in particular situations.[46] Questions of power, morality and politics were regarded as external to the legal discipline.[47] The presumption underlying such questions was that law to constrains and regulate international politics. Realists rejected this presumption, and dismissed international law's ability to ultimately discipline the political in such ways. This move resulted in a contrast between those advocating 'speaking law to power' and those who identified themselves as 'speaking reality to lawyers.'

In this presumed dichotomy, let's first take a closer look to the logic of 'speaking law to power.' This assumption understands law as an instrument for constraining and disciplining the political. Politics is the negative counterpart of law, and therefore law is by definition a-political.[48] As the opposite of politics, law and legality are regarded as protectors against arbitrary excesses of state power, aimed at subduing the irrationality and complexity of social reality. Judith Shklar described this logic as the 'ethos of legalism.' According to Shklar, legalism is 'the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.'[49] Or as Wouter Werner explains, Shklar holds this 'ethos of legalism' to be an attitude that: 1) views social relationships in terms of rights and duties; 2) treats law as a body of pre-existing rules that exists independently

[46] Shabtai Rosenne, *The Perplexities of Modern International Law* (Martinus Nijhoff Publishers, 2003), at 26 and Wouter Werner, 'The Use of Law in International Political Sociology' (2010) 4 *International Political Sociology* 304-307, at 305.
[47] Wouter Werner, 'The Use of Law in International Political Sociology' (2010) 4 *International Political Sociology* 304-307, at 305.
[48] For a critical discussion of this counterpositioning, see Sarah Nouwen & Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941-965, at 944.
[49] Judith Shklar, *Legalism. Law, Morals, and Political Trials* (Harvard University Press, 1964), at 1.

from social action; 3) posits that law should be understood separately from non-law concerns such as politics and morality; and 4) fears and fights arbitrariness and the tyranny of arbitrary power.[50]

In the legalist understanding, political reality is often experienced as an unfair playing field in which power wins and arbitrariness rules, and law is regarded as neutral, objective, and, if constructed carefully and fairly, an instrument of justice. In the realm of international law, the debate surrounds questions such as whether international law is law despite effective enforcement mechanisms and whether it is, should or can be effective in suspending politics. Legalization (or juridification), particularly through criminal law, seems to promise completion of international law by resembling national law at its most emblematic, Gerry Simpson explained.[51] It promises the depoliticization of issues of fundamental and deep-seated political contention.[52] International law thus understood is regarded as an instrument for suspending the political. For example, as Malcolm Shaw writes in the opening pages of his *International Law* textbook:

> Power politics stresses competition, conflict and supremacy and adopts at its core the struggle for survival and influence. International law aims for harmony and the regulation of disputes. It attempts to create a framework, no matter how rudimentary, which can act as a kind of shock-absorber clarifying and moderating claims and endeavouring to balance interests. In addition, it sets out a series of principles declaring how states should behave.[53]

This contrasting of law against the political presents law as 'savior' from the danger called politics, as a neutral and abstract bringer of good values aiming to subdue the politics of conflict. In search for neutral and fair decision-making, and hoping to escape from the arbitrariness that politics is often associated with, envisioning law as able to suspend politics seems a tempting road to take. It, however, ignores the social context in which law exists and the social diversity in which it functions. It fails to account that law is based on and an outcome of political choice, as well as the ways in which law produces reality, symbolic orders and power,[54] that the legal language is also a particular form of politics, and that the structure of legal argumentation represents what a (legal) community accepts as law and not.[55] It overlooks that law

[50] Wouter Werner, 'Security and International Law: Between Legalism and Securitisation', in Bourbeau (ed.), *Security: Dialogue across Disciplines* (Cambridge University Press, 2015),
[51] Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 140.
[52] Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 140.
[53] Malcolm N. Shaw, *International Law*, 6th edn (Cambridge University Press, 2008), at 12.
[54] Wouter Werner, 'The Use of Law in International Political Sociology' (2010) 4 *International Political Sociology* 304-307, at 305.
[55] See for instance Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, 2005); Wouter Werner, 'The Use of Law in International Political Sociology' (2010) 4 *International Political Sociology* 304-307, at 305; Philip Liste, 'Articulating the Nexus of Politics and Law: War in Iraq and the Practice within Two Legal Systems' (2008) 2 *International Political Sociology* 38-55; David Kennedy, *International Legal Structures* (Nomos Publishers, 1987).

reflects the outcome of a political struggle and thus is the product of power, and as such may embody and reinforce structural inequalities, power relations and interests. Moreover, it ignores the constitutive or performative power of law: the ways in which it *produces* new realities, by including and excluding what is recognized as legal, relevant and convincing, which constitutes in and of itself political force.

Law is a social construct that doesn't have a pre-existing shape prior to human intervention,[56] but is instead produced in particular discourses.[57] Nevertheless, in the fight to claim international law's objective value, law is *presumed* to pre-exist at the same time, and thus being more than a product of mere will. In addition to consent-based sources, lawyers therefore invoke legal bases through which (a particular interpretation's representation of) the 'universal,' 'moral' and 'natural' is asserted. When disagreement on the substance of law persists, law cannot in and of itself bring resolution on such disagreements. Rather than 'law' as such, it is law-appliers, adjudicators and decision-makers, placed into their positions by procedural rules that create institutions and decision-making powers, who ultimately bring resolution. Such disputes are resolved not by recourse to law, but by using interpretation and discretionary principles such as, for instance, reasonableness, fairness, and proportionality. These principles are used to add substance and choose direction where the law itself can do no more than reflect the extent to which there is agreement.

Law can thus not be contrasted with the political, as Shaw and other 'mainstream' international lawyers tend to do, because it cannot take away the nature of the political. To paraphrase Judith Shklar, in a morally pluralistic world, international law and the search for justice do not hang above the political world but stand in its very midst.[58] Social conflict must still be resolved by political means despite aims to translate our current world order in a society abiding by an international Rule of Law.[59] Thus, translating issues from political problems into legal ones does not take away the political nature of the problems and does not overcome moral diversity.

In the legalist logic, law is thus separated from morality and politics. Following this legalist logic leads to an ideology and policy of justice that insists on the need for uncompromising rules and rule following.[60] In order to separate law from the political, legalists from the positivist tradition point to the sources of law and the validity of the norms. They believe that rules are somehow lifted out of the political

[56] James Boyle, 'Ideals and Things: International Legal Scholarship and the Prison-House of Language' (1985) 26 *Harvard International Law Journal* 327-359, at 331-332.
[57] See for example how the US Court of Appeals and the German Federal Administrative Court reasoned in opposite ways on the boundaries and relation of law and politics in cases concerning the 2003 invasion of Iraq, Philip Liste, 'Articulating the Nexus of Politics and Law: War in Iraq and the Practice within Two Legal Systems' (2008) 2 *International Political Sociology* 38-55.
[58] Judith Shklar, *Legalism. Law, Morals, and Political Trials* (Harvard University Press, 1964), at 123.
[59] Martti Koskenniemi, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4-32, at 7.
[60] Judith Shklar, *Legalism. Law, Morals, and Political Trials* (Harvard University Press, 1964), at 122-123.

realm when they can be connected to legal sources, emphasizing their validity as detached from political strife.[61] By contrast, legalists with a naturalist understanding of law believe that law's leading principles emerge from the observation of life itself. Natural law consists of norms and rules that reflect those moral rules that are valid independently of circumstances of time and place.[62] Legalists who reason from a naturalist assumption therefore hold that society can employ a consistent policy of justice by imposing a unity upon it.[63] However, neither lifting rules out of their political reality by basing their validity on positivist sources, nor deriving rules from nature or the observance of life is actually possible, because a rule cannot overcome social conflict *by itself*, nor does it have the ability to overcome the reality of moral plurality.

How does this apply to the aggression debate? Legalists maintain that 'politics' compromises the functioning and integrity of 'law.' In this perspective international criminal trials are under a looming danger of becoming 'political' trials and must therefore be cleansed of political influence.[64] Gerry Simpson refers to this as 'transcendent legalism': when politics seems to be interfering with judging, politics must be swept aside.[65] For these legalists, there is only prosecution and trial on the one hand, and the interfering and disrupting political on the other. For example, Eric Posner seems to exclude the possibility that a trial can be both fair and political when he concludes that the Hiss trials of 1949 were not political because they seemed to have been fair.[66]

However, according to Koskenniemi in his 2013 SOAS lecture, every trial is political, 'because every trial represents power, a hierarchy, a set of values, and preferences.'[67] Otto Kirchheimer understood the reason for trials exactly in their value to use the integrity of the legal system to pursue political ends.[68] He argued that '[i]n its simplest and crudest terms, (…) the courts eliminate a political foe of the regime according to some prearranged rules.'[69] He thereby recognized that the political nature of a trial

[61] For example Kelsen's pure theory of law, where he claims that all law can be deduced back to a Grundnorm or basic norm, which is the origin of legitimacy. However, he fails to account for where the Grundnorm itself then finds its normative foundation, Hans Kelsen, *Pure Theory of Law* (University of California Press, 1967).
[62] Hedley Bull, 'Natural Law and International Relations' (1979) 5 *British Journal of International Studies* 171-181, at 179.
[63] Judith Shklar, *Legalism. Law, Morals, and Political Trials* (Harvard University Press, 1964), at 122-123.
[64] Cherif Bassiouni, 'From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Criminal Court' (1997) 10 *Harvard Human Rights Journal* 11-62.
[65] Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 20.
[66] Eric Posner, 'Political Trials in Domestic and International Law' (2005) 55 *Duke Law Journal* 75-152, at 82, note 89.
[67] 'International Justice: Between Impunity and Showtrials', lecture by Martti Koskenniemi on 4 January 2013 at SOAS, University of London, available at https://www.youtube.com/watch?v=2QTBdPyQtEw, at 6:45.
[68] Otto Kirchheimer, *Political Justice. The Use of Legal Procedure for Political Ends* (Princeton University Press, 1961).
[69] Otto Kirchheimer, *Political Justice. The Use of Legal Procedure for Political Ends* (Princeton University Press, 1961), at 6.

does not necessarily obviate its legal character. Instead, he observed their inherent entanglement, the co-existence of law and politics, and the disciplining power that emerges from the legal process in a state's struggle against its enemies. Through the use of 'prearranged rules,' Kirchheimer held, '[j]udicial proceedings serve to authenticate and thus to limit political action.'[70]

None of the legalist attempts to separate the legal from the political resolve the underlying issue of choosing which values to prefer above others, which morality holds the upper ground, and which right trumps another. Barring the improbable occurrence of our ceasing to be different from one another, attempts to construe legal terminology will not diminish the tensions that derive from differences of perspectives. As Shklar put it, '[i]t is not the words but the feelings behind them that cause men to fight.'[71]

The prohibition to use force is surrounded by grey areas and thus contestation. For instance, what is an armed attack against which self-defense is allowed? When is pre-emptive or preventive force allowed? Does a right to self-defense exist against non-state actors? How should we interpret Security Council authorizations, and whose interpretation is followed? Challenging as it would be to criminalize the use of illegal force as such, the crime of aggression faces an additional complication. In the process of regulating and criminalizing aggression it became clear that the majority view regarded there to be a distinction between the two terms 'illegal use of force' and 'aggression,' meaning that not all illegal uses of force qualify as aggression. However, agreeing on textual provisions to distinguish between the terms 'use of force' and 'aggression' and between 'aggression' and 'crime of aggression' proved to be difficult. The process of trying to draw a line between aggression and non-aggression and to determine which behavior should fall within the ambit of the criminal law norm goes to the very heart of international relations, raising questions about the nature of world order, power, the binding character, scope and function of international law, and the nature and purposes of the United Nations. It also calls into question the desirability of having such a (juridical) definition with generalized power, applicable to all. What one country sees as humanitarian, legitimate and even heroic, another might consider as aggressive; what is regarded as a pre-emptive measure for some, is offensive, provocative and aggressive force to others. Moreover, in the crime of aggression, the idea of a neutral, non-political application of law is challenged not only by this ongoing substantive disagreement over what aggressive versus what is legal and legitimate use of force, but also by the high intensity of the stakes involved in matters of war and peace. It is the last topic that states are willing to compromise on, as it may turn on their own position in the world and their ability to address threats to their way of life.

---

[70] Otto Kirchheimer, *Political Justice. The Use of Legal Procedure for Political Ends* (Princeton University Press, 1961), at 6. See also Sarah Nouwen & Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941-965, at 945-946.

[71] Judith Shklar, *Legalism. Law, Morals, and Political Trials* (Harvard University Press, 1964), at 26.

Moral philosophers engaging in the justification of war literature argue that various examples of 'just wars' should be exempted from the scope of aggression. For example, Michael Walzer asserts that war not only *can* be judged *morally*, but that it is necessary to do so. He defends his moral approach to the justness of war on the basis of a presumed widely shared morality concerning questions of just and unjust war. However, the presumed shared morality that he presents is liberal in essence, and excludes non-liberal approaches as wicked and simple.[72] Larry May points back to Thomas More's Utopia in which the reasons for fighting a just war are described as follows: Utopians 'go to war only for good reasons: i) to protect their own land, ii) to drive invading armies from the territories of their friends, or iii) to liberate an oppressed people in the name of humanity, from tyranny and servitude.'[73] May submits that many would agree that wars waged for More's three reasons would not be considered aggressive wars.[74] He asserts that resorting to force for defensive purposes or out of concern for the human rights of one's own population or another people should not count as aggression.[75] In May's view, defensive purposes that are not aggression should not be aimed at territory as such, but at protecting a human population. This therefore also includes resort to force for protecting essential economic and political institutions that protect this population and thus broadens non-aggressive defensive force far beyond responding to an 'armed attack.'[76] Similarly, George Fletcher and Jens Ohlin argue that the right to self-defense under the collective security system includes the defense of other nations, notwithstanding whether or not they are part of another state, as long as they are subject to violence by that state. They thereby argue that the right to self-defense *includes* a right to humanitarian intervention to assist suppressed groups.[77] By contrast, David Rodin rejects such broad constructions of the right to self-defense. He argues that under a proper understanding of human rights, self-defense is not allowed against *political aggression*, thereby rejecting the just war theory in which such response was not only permissible but even required. Rodin asserts, however, that this ignores human rights as true moral compass for the justness of war. Instead, Rodin's 'justified interdiction theory' allows only resort to force against genocidal or near genocidal aggression, when human rights proper, rather than political stakes, are violated.[78]

---

[72] Michael Walzer, *Just and Unjust Wars. A Moral Argument with Historical Illustrations*, 4th edn (Basic Books, 1977), at xxii-xxv.
[73] Thomas More, Utopia 85 (George M. Logan & Robert M. Adams eds., Cambridge University Press 2002)(1516), cited in Larry May, 'Aggression, Humanitarian Intervention, and Terrorism' (2009) 41 *Case Western Reserve Journal of International Law* 321-340, at 321.
[74] Larry May, 'Aggression, Humanitarian Intervention, and Terrorism' (2009) 41 *Case Western Reserve Journal of International Law* 321-340, at 321-322.
[75] Larry May, *Aggression and Crimes against Peace* (Cambridge University Press, 2008).
[76] Larry May, 'Aggression, Humanitarian Intervention, and Terrorism' (2009) 41 *Case Western Reserve Journal of International Law* 321-340, at 324.
[77] George P. Fletcher & Jens David Ohlin, *Defending Humanity: When Force Is Justified and Why* (Oxford Univeristy Press, 2008).
[78] David Rodin, 'The Myth of Self-Defence', in Cécile Fabre & Seth Lazar (ed.), *The Morality of Defensive War*(Oxford University Press, 2014), pp. 69-89, at .

Moreover, disagreement persists on whether or not, when, and under what circumstances certain actions of others justify response, pre-emption or even prevention through armed force or other coercive means. Chapter 3 considers these discussions in more detail, but the point here highlighted is that due to the indeterminacy of the notion of aggression, both broader and narrower conceptions of the use of force can be argued as both moral and legal positions, and can be supported by legal reasoning. Opposing positions and arguments can be passionately defended as 'legal' and 'moral' by one side and vehemently rejected as 'illegal' or 'immoral' by the other, without the 'law' providing any authoritative means to rise beyond fundamental substantive contestation.

It follows that even though in the abstractness of generalities there is widespread consensus about the undesirability of aggressive war as well as on the need for and legitimacy of using force in certain situations and under certain circumstances, the question of whether a particular use of force constitutes *aggressive* use of force or not is often subject to fundamental disagreements. Why is that?

The legalist argument that the crime of aggression should be understood in the sense of 'speaking law to power,' applying a law that is foreseeable and neutral, distinguishing between just and unjust wars, between aggression and non-aggression, presupposes a working conception of justice.[79] Since the meaning of justice is essentially contested and its interpretations are inherently and fundamentally disagreed upon, reasonable legal scholars and other partakers in this discourse have maintained diverging opinions on whether a particular use of force is just and legitimate, or, instead, aggressive. The assumptions that underlie these debates on the legality, legitimacy and aggressiveness of use of force differ, providing for different frames from which arguments are formed, and leading to disagreements when it comes down to concrete situations. These different and contradicting assumptions are derived from a variety of different perspectives and positions, such as different worldviews and perspectives on world order, different power positions in this global order, different (geo-)political interests, different morals and values, different local constituencies, different images of reality, and different risk assessments and weighing of relevant factors that may affect the determination of the aggressiveness of use of force. Due to all these contrasting assumptions that underlie the notion of aggression, the disagreement on where to draw the line between aggression and non-aggression is fundamental, essentially contested, and inherently political, and the notion of aggression indeterminate. Any line that is drawn is contested in every aspect of its application. Because the notion of aggression is a notion between equals, between states that each formally hold sovereign equality vis-à-vis each other, and because it attempts to provide at the same time the freedom to be protected against another's aggression *and* the freedom to use force when it is not deemed aggression but instead for the 'good,' the meaning of which is essentially contested, it provides for a norm that allows both A and non-A at the same time.

[79] Jan Klabbers, *International Law* (Cambridge University Press, 2013), at 187.

The crime of aggression is therefore not based on a rule that provides substantive guidance for the purpose of determining the aggressiveness of use of force. It cannot be regarded as 'objective' or, in Shaw's words, as the 'shock-absorber clarifying and moderating claims and endeavouring to balance interests.' For that reason, international criminal law is inherently limited in its ability to overcome the political nature of this distinction, as it can only reflect what is agreed on, and thus up to the point where disagreement prevails.

The decision of whether or not to use armed force is very complex, relating to, for instance, the unforeseeability of how a resort to force plays out on the ground, what a 'success' means in this respect, what other developments the force sets in motion, how much death and destruction is expected to follow, and whether from hindsight the use of force will be deemed a success or failure, good or bad, and lawful, legitimate or aggressive. Therefore, the question of the aggressiveness of force is innately complicated by the sheer number of factors that may be relevant. Moreover, because each of these factors is approached and interpreted differently, arriving at substantive agreement on what use of force is aggressive and what not is highly challenging. Constructing such a rule therefore provides legal grounding for mutually exclusive positions, creating an indeterminacy in the deep structure of the provision. The legalist idea of applying a 'neutral' law to overcome and suspend politics therefore misunderstands the complexity of assumptions that underlie the notion of aggression and how law and politics relate to and co-constitute one another.

2.2 …and Back Again

In contrast to the 'legalist' vision of the presumed 'law *versus* politics' dichotomy, the 'realist' view regards the notion of aggression to be indeterminate and impossible to separate from its political context. This logic follows the critique of the inherently political nature of law described in Section 2.1. Yet, when such critique is framed in the realist tradition, the understanding of law's inability to overcome the political tends to lead to the conclusion that international law is irrelevant because it is nothing but political, because it lacks (adequate or any) enforcement mechanisms, or because it merely masks disagreement and veils the inexistence of an international community and universal values.[80] In the words of Philip Allott: 'International law is the age-old

[80] In the 1940s, neoclassical realism became very popular in international relations theory, especially due to the writings of E.H. Carr and Hans Morgenthau. Realism combines a pessimistic view of human nature with a notion of power politics between states that exist in an international anarchy. It presumes that states are locked in a perpetual fight for power, and that international cooperation is only possible to the extent that that it responds to states' own self-interest. International law functions to the point that states need to violate it in their pursuit of their own interest. Ultimately, therefore, in the view of realists, politics trumps law.

rule of power masquerading as the age-old Rule of Law. It is disorder usurping the name of order. It is an education in illusion, imperfection, and irrationality.'[81]

The realist critique has been particularly strong in promoting this view of 'speaking reality to lawyers.' Realists like Lord Hankey and Henry Kissinger criticized war crimes trials as utopian, bad politics, and even dangerous. They believed that 'justice' on the international level should be evaluated by statesmen, with an eye to restoring relations and interest positions rather than retribution. Such anti-legalist critique argues that international criminal trials create martyrs of the accused or bar the rehabilitation of states condemned as 'rogue.'[82] Other anti-legalists find the international criminal justice project utopian because they don't believe that they are sufficiently vengeful, that aggressors have relinquished the right to argue their case in judicial proceedings, and that summary execution or other types of eye-for-an-eye-punishments are the only appropriate punishment.[83] Finally, Hans Morgenthau and others repeated their critique that the United Nations and international law—including international criminal law—were nothing but new forums for power politics rather than substitutes for politics.[84] In their view, creating such institutions only served to channel political tensions into committees, assemblies and formal dispute settlement mechanisms: it could never subdue them.[85]

The realist concept of the political understands all decision-making and social action as political. This view, however, has as its result that all law is submerged into the political, and there is no space left for the non-political.[86] Yet this does not explain why then the language of law has become the main language in which discussions on use of force are held.

International law is all around, invoked and appealed to everywhere. Increasingly, policy problems as well as general moral questions are phrased in terms of 'the right to… .'[87] They are displacing former conceptions of the public sphere and the powers and tasks of the state or community, of civic and solidarist duties, and personal virtue and conviction.[88] Most international debates are framed by international law.[89] To a large extent, modern politics can be described as legal politics. The rules of

[81] Philip Allott, 'Reconstituting Humanity. New International Law' (1992) 3 *European Journal of International Law* 219-252, at 250.
[82] Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 21.
[83] Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 21.
[84] Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), at 439.
[85] Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), at 461.
[86] Sarah Nouwen & Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941-965, at 944-945.
[87] Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge University Press, 2014), at 230.
[88] Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge University Press, 2014), at 230.
[89] See for a discussion hereof James Crawford & Martti Koskenniemi, 'Introduction', in James Crawford & Martti Koskenniemi (ed.), *The Cambridge Companion to International Law*(Cambridge University Press, 2012), at 3-4.

interaction are legal, the actors and players are legal institutions, their powers are enabled and limited, increased and decreased by law.[90] As Ian Johnstone for example shows with regard to Security Council deliberations, there is a felt need by states to justify actions on the basis of international law.[91] Johnstone asserts that even though, *prima facie*, the 1999 Kosovo intervention could be seen as disproving the significance of legal discourse within the Security Council because the bombing campaign against Serbia occurred despite its illegality, this dismissive view of law is too simplistic because the discourse in itself was discussed on the basis of norms, using *legal* argumentation.[92] Arguing about the legality or illegality of behavior dismisses the relevance of arguing about it in a-legal terms, or non-legal terms. Moreover, despite recognizing that international rules are rarely enforced, Louis Henkin noted that, nevertheless, 'most states obey most law most of the time.'[93] Onuma Yasuaki argues in similar lines, submitting that the very fact that most states refer to international law and behave generally in accordance with international law demonstrates the falsehood of the argument that international law is meaningless or irrelevant in international relations. He notes that this points to a more complex understanding of international law's raison d'être than merely in terms of whether or not international law can restrict states to act in certain ways.[94] At the very least, use of force practice shows that states use all sorts of creative legal argumentative techniques to justify their (potential) resort to force or condemn another's in legal terms.

To dismiss international law as irrelevant doesn't explain why international law is the language that is chosen to discuss matters of international relations in. Choosing the language of law is done, for instance, to bolster reputations, to conceal violations of law, and to push the meaning of law in certain directions. First, with regard to reputation, for instance Andrew Guzman wrote on the importance of reputation towards compliance with international law. Guzman explains that '[a] reputation for compliance with international law is valuable because it allows states to make more credible promises to other states. This allows the state to extract greater concessions when it negotiates an international agreement.'[95] Second, states may argue that their actions are in compliance with international law to conceal that they are in fact not, or argue that their activities do not fall under the legal rule they are allegedly violating.[96] And third, arguments on use of force and interpretations of what aggression is are also

[90] David Kennedy, *Of War and Law* (Princeton University Press, 2006), at 13.
[91] Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument' (2003) 14 *European Journal of International Law* 437-480, at 440.
[92] Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument' (2003) 14 *European Journal of International Law* 437-480.
[93] Louis Henkin, *How Nations Behave. Law and Foreign Policy* (Columbia University Press, 1968), at 253.
[94] Onuma Yasuaki, 'International Law in and with International Politics: The Functions of International Law in International Society' (2003) 14 *European Journal of International Law* 105-139.
[95] Andrew T. Guzman, 'Reputation and International Law' (2006) 34 *Georgia Journal of International and Comparative Law* 379, at 383.
[96] See for instance, Robert O. Keohane, 'International Relations and International Law: Interests, Reputation, Institutions' (1999) 93 *American Society of International Law Proceedings* 375, at 377.

used to ultimately change the law without necessarily changing the textual provisions. By using and invoking international law in particular ways, the aggression norm and the use of force paradigm is shaped and constructed in particular ways. The norm construction process is by no means static and actors may adopt new patterns of reasoning and may begin to pursue new state interests.[97] This process of social construction leads to certain ways in which international law is understood and used. And this again structures the international relations between states.[98] How we understand the norms at any particular moment in history is therefore an outcome of the social construction that takes place in the interpretive communities that invoke these norms with any authority, and renders the use of international law as anything but irrelevant.

Looking at the recent Crimea situation, for example, both Russia and the Ukraine invoked legal argumentation to make their case. On 28 February 2014, Russian military troops were sent to Crimea in addition to those already stationed there, claimed by Russia as being part of a military exercise and in accordance with the agreements between the Ukraine and Russia for Russian military presence in Crimea. On 1 March, Russian President Putin requested permission from the Russian parliament to send more troops to Crimea, to protect the safety of ethnic Russians. On that same day, the Ukrainian parliament declared that it interpreted the increased Russian military presence in Crimea as a military invasion and the Russian decision to send additional troops as a declaration of war. On 4 March, Putin made a public statement in which he denied that Russia had annexed Crimea, that the Russian uniformed military troops that were surrounding key strategic locations in Crimea were not Russian troops but Ukrainian troops (suggesting that they wore Russian uniforms left over from when Ukraine was part of the USSR), that Russia did not recognize the new Ukrainian government, and that the Russian military presence was invited by the lawful government of Ukraine, led by President Yanukovych. By 12 March, Crimea was fully isolated from the rest of Ukraine through a closure of the main airfield (with the notable exception of flights to and from Moscow), which followed the occupation of the railway headquarters and roadblocks to close off all land routes, and the blockade of Sevastopol harbor that prevented Ukrainian warships from leaving or entering the port. After a referendum in which the population of Crimea expressed its wish to become part of Russia, Crimea was formally annexed. By 24 March, the Ukrainian military was withdrawn from Crimea, after Kiev's last remaining military assets were stormed by the Russian military in the week before.

---

[97] See also Peter M. Haas, 'Introduction: Epistemic Communities and International Policy Coordination', in Peter M. Haas (ed.), *Knowledge, Power, and International Policy Coordination*(The University of South Carolina Press, 1997), pp. 1-36, at 2.

[98] See for the social construction in international law for example Ian Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities' (1991) 12 *Michigan Journal of International Law* 371, who observes at p. 376 that '[l]aw structures the relations among States by providing a common frame of reference. It is the language of international society: to present one's claims in legal terms means to signal which norms one considers relevant and to indicate which procedures one intends to follow and would like others to follow.'

During these events, Ukraine accused Russia of committing aggressive war by threatening and using force to annex territory belonging within the territorial integrity of Ukraine. Meanwhile, Russia rejected the accusation that it had committed aggression by claiming that its military presence was invited by the lawful Ukrainian authorities, that the people in Crimea were exercising their right to self-determination, that Russia had merely assisted Crimeans in exercising their human rights, and that it acted to protect its 'compatriots' in Crimea against Ukrainian 'fascists.' Interestingly, both sides invoked legal argumentation to buttress their claims.

A few years earlier, in 2008, Russia had similarly invoked legal argumentation to justify its military intervention in Georgia, which led to the Russian occupation and *de facto* separation and independence of Abkhazia and South Ossetia from Georgia. Russia successfully tested the technique it would later re-invent in the Ukraine, issuing Russian passports generously to those living in the Georgian areas of Abkhazia and South Ossetia. When Georgia moved against South Ossetian separatists, Russia invaded with overwhelming military might, with the claim that it had to do so in order to protect its nationals and that this occurred in full compliance with international law. When the gun smoke vanished, both South Ossetia and Abkhazia had been occupied by Russian troops, and Georgia had lost all control over the territories. When Russia recognized the territories as independent states, Russian President Medvedev invoked the Kosovo situation as a legal precedent. Kosovo had only months before declared its independence from Serbia, which was soon recognized by a considerable amount of (predominantly Western) states. Medvedev had opposed Kosovo's independence, but was now quick to turn the argumentation around and make use of the legal principle that law applies equally to all. As Medvedev wrote in the *Financial Times*:

> 'Western countries rushed to recognise Kosovo's illegal declaration of independence from Serbia. We argued consistently that it would be impossible, after that, to tell the Abkhazians and Ossetians (and dozens of other groups around the world) that what was good for the Kosovo Albanians was not good for them. In international relations, you cannot have one rule for some and another rule for others.'[99]

Law's power to discipline the political thus works both ways: subjecting the political to the legal framework, but also empowering politics with the law's force.[100]

[99] Dmitri Medvedev, 'Why I had to recognise Georgia's breakaway regions', Financial Times of 26 August 2008.

[100] See for an comparison on how Russia uses legal argumentation in the 2008 Georgia crisis and how Western states use legal argumentation on Kosovo, Christopher J. Borgen, 'The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia' (2009) 10 *The Chicago Journal of International Law* 1-34. Borgen observes that where the US and other NATO countries shy away from using the legal language to defend (highly) controversial cases such as the NATO bombings and instead focused on the moral importance of stopping ethnic cleansing, Russia, even where it had a weaker legal argument, it nonetheless placed the

Likewise, in the 2003 invasion of Iraq, legal arguments were construed as legitimizing the use of force. US and UK officials argued that existing UN Security Council authorizations relating to the 1991 Gulf War and the subsequent ceasefire (Resolutions 660 and 678) and the inspections of the Iraqi weapons programs (Resolution 1441) had already authorized the invasion. They moreover argued that customary law included a right to self-defense that allowed them to respond to Iraq's alleged possession and willingness to use weapons of mass destruction. A third legal avenue relied on the idea of humanitarian intervention to protect Iraqi civilians from their oppressive government. The argument there was that despite the absence of Security Council authorization, a humanitarian intervention in pursuit of the responsibility to protect individuals from their governments' atrocious crimes justified the use of force against Iraq.

The 2011/2012 Libya bombing campaign occurred subsequent to a Security Council resolution that authorized the use of force to protect civilians and civilian populated areas: UN Security Council Resolution 1973. The Resolution, however, specifically excluded the authorization of a foreign occupation force in any form on any part of the Libyan territory. When the situation became full-fledged warfare that led to regime change, legal justifications were again presented in order to demonstrate how this was not a violation of UN Security Council Resolution 1973 but instead was in line with its purpose of protecting individuals and following the responsibility to protect individuals from crimes committed against them by the Qadhafi regime.

Moreover, when in the 2013 discussions on whether or not to intervene in Syria it became clear that the Security Council would not authorize such intervention under Chapter VII, the debate revolved around whether or not legal justification existed for using force absent a UN Security Council authorization. Because the existence of a right to humanitarian intervention absent Security Council authorization was widely rejected and militarily powerful states such as the US were not keen to engage in another scarcely supported war on such scale, the discussions narrowed to the question of whether or not the use of chemical weapons by the Syrian regime provided a separate justification for using force against Syria. US President Obama had previously issued a warning to the Syrian regime that using chemical weapons would cross a red line. Upon the alleged use of such weapons, the 'red line'-discussions surrounded the question whether or not the use of chemical weapons trumped the prohibition on the use of force, justifying the use of force against the state that deployed these weapons.

In all these situations, legal arguments were used to argue both for and against resorting to force; pro and contra the lawfulness, legitimacy and aggressiveness of a particular use of force. Notwithstanding one's position on the current substance of *ius ad bellum*, which governs the question of the legality of use of force, and which legal

---

legal argument front-and-center, following a rhetoric that Russia has a high(er) concern for the norms of international law.

argumentation is found more sound and convincing than other in any particular situation, legality has become the vernacular through which the question of whether or not to use force is discussed. Certain argumentation is recognized as legally sound or at least possible; other arguments dismissed as lacking any foundation in law.

Notably, the legality paradigm is not the exclusive domain of lawyers discussing rule application. Legality, legal appearance and form, and legal language have become widely used in all sorts of manifestations of human thought, social as well as juridical norms of judgment, and conduct.[101] This does not mean that law trumps power politics, or that law erases the inherently political nature of such decisions. However, the functioning of world politics and the role of legality in it is more complex than assertions that dismiss the power or relevance of legality credit. Thus, without disagreeing with the critique that enforcement of international law is mostly lacking and that law is often used to mask disagreement and power politics, dismissing international law as irrelevant oversimplifies its actual functioning in practice. Law has no meaning absent politics. As Gerry Simpson explains, '[l]aw is politics transformed. Law can neither be reduced to politics nor can it be incubated against politics.'[102] Neither the legalist view of international law as a comprehensive instrument for controlling the 'wild west' of politics nor the realist view of an international law as an instrument of power politics thus seems to hold sway.

Legal language holds power. Even if it cannot provide substantive solutions where substantive agreement is lacking, law disciplines what is recognized as (il)legal as opposed to *a*-legal or non-legal. Law dismisses a-legality: arguments that do not recognize the legal-illegal division.[103] Whereas illegality forms the negative counterpart of legality, a-legality points to conduct that challenges the distinction between legality and illegality as drawn by the legal order in a given situation.[104] Law does not recognize the claim of a-legality, it does not recognize conduct that refuses to be captured by an applicable norm and will re-categorize it as conduct that does. Legal orders prefer (il)legality above a-legality, and thus exclude or reinterpret arguments that cannot be reduced to the legal-illegal antithesis.[105]

Critical legal studies scholarship helps us understand how law's openness enhances its disciplining force rather than diminishing it. Critical legal studies focuses on the indeterminacy and political nature of norms and shows that international law concepts do not hold an objective or coherent plan for a better world. Scholars of this school of thought brought the insight that the indeterminacy of norms lies in their deep

[101] Nikolas Rajkovic, 'Rules, Law, and the Politics of Legality: Critical Sociology and International Law's Rule' (2014) 27 *Leiden Journal of International Law* 331-352, at 341; Ben Golder & Peter Fitzpatrick, *Foucault's Law* (Taylor & Francis, 2009), at 35-37.
[102] Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 23.
[103] See for an insightful expose of legality, illegality and a-legality, Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of a-Legality* (Oxford University Press, 2013).
[104] Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of a-Legality* (Oxford University Press, 2013), at 30-31.
[105] Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of a-Legality* (Oxford University Press, 2013).

structure, which provides mutually exclusive rights claims between equals and combines consensual and non-consensual sources to underpin such claims. Unlike the realists, however, critical legal scholars do not argue that therefore law is irrelevant. Instead, they contend that it is the task of the lawyer to reveal that law requires choice rather than providing objective truths. According to Martti Koskenniemi, for example, the lawyer's role is to participate in a practice that tries to reach the most acceptable solution under contemporary and future circumstances, recognizing and embracing the political, rather than viewing law as unable to discipline the political and turning to nihilism or radical relativism.[106]

Koskenniemi opens his discussion on the identity of international law in *From Apology to Utopia* by explaining that international lawyers fight to claim international law's independence from international politics. International lawyers do this by both ensuring, on the one hand, the *normativity* of law by creating a distance between law and state behavior, will and interests; and on the other hand ensuring law's *concreteness* by distancing law from natural morality. He writes:

> 'A law which would lack distance from State behaviour, will or interest would amount to a non-normative apology, a mere sociological description. A law which would base itself on principles which are unrelated to State behaviour, will or interest would seem utopian, incapable of demonstrating its own content in any reliable way. To show that an international law exists, with some degree of reality, the modern lawyer needs to show that the law is simultaneously normative and concrete – that it binds a State regardless of that State's behaviour, will or interest but its content can nevertheless be verified by reference to actual State behaviour, will or interest.'[107]

Since the 1970s, and influenced by, among others, the radical feminist and Marxist movements, contributions from critical legal studies scholarship have demonstrated the inherently political nature of law and the difficulty of understanding law as objective means to suspend the political.[108] They have shown that legal arguments form patterns and that there is a limited set of arguments that can acceptably be invoked to justify a solution. For example, David Kennedy and Koskenniemi demonstrated that the arguments that are used to defend opposing positions in doctrines that have long been debated without one side having been able to 'win' the discussion, often show that the arguments that are used opposite to each other are actually not opposites but depend on each other's existence.[109] In *From Apology to*

[106] Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, 2005), at 533-561.
[107] Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, 2005), at 17.
[108] See for example Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 *Buffalo Law Review* 205-382.
[109] On the structure of the international legal argument and discussion of the (in)determinacy of international law, see David Kennedy, 'Theses About International Law Discourse' (1980) 23 *German*

Utopia, Koskenniemi argued that the argumentative structure in international law cases before the ICJ do not provide material justification for solutions to legal problems, but only prevent the judgments to be regarded as 'openly political rhetoric.' Koskenniemi demonstrates that law *exerts* power exactly by being *both* open and structured, by allowing the substantive disagreement that may underlie law to coexist with its disciplining power. Law is open as it enables argumentation based on contradictory assumptions, blending arguments invoking concreteness as well as normativity, invoking the 'is' as well as the 'ought.' But due to law's structure, it induces the challenger to counter these arguments by contesting the argument's ultimately apologetic or utopian character, whichever it seeks to disempower. Depending on which of the system's two contradictory demands (concreteness and normativity) one is led to emphasize, different, and indeed contradictory, solutions can be made that seem equally acceptable.[110]

However, international law is not infinitely manipulable either. Some arguments are more acceptable, more credible, than others.[111] And some arguments are instantly dismissible as 'not legal.' This suggests that there is some (minimal) form of normative framework that structures international legal discourse. This is often associated with the existence of (at least a minimal form of) an international community. Despite plurality in morality, norms, values and interests that co-exist, modern history shows at least a minimal development of a shared normative climate such in the human rights discourse, international criminal law and the idea that there are limits to state sovereignty and the principle of non-intervention when it comes to grave human rights violations, for example. Yet, without denying these developments in society as well as their reflection in international legal discourse, the variety in views on where exactly to draw lines and rules, which rights and interests are to be preferred above others, by which duty-bearers, and by which authority, and how to 'weigh' one right against other rights, demonstrate the limitedness of this global normative community. This provides challenges in the actual application of law to concrete cases that goes beyond a legal interpretative challenge.

The indeterminacy thesis that developed in the critical legal studies tradition and demonstrates the elasticity of law does therefore not dismiss the meaningfulness of law and international law. It rather helps to understand, shape and construct the discourse.[112] It provides the analytical tools to understand that law as such cannot operate to mediate between conflicting norms because its incapability of providing

---

Yearbook of International Law 353; and Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, 2005).

[110] Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, 2005), at 67-69. David Kennedy, 'Theses About International Law Discourse' (1980) 23 *German Yearbook of International Law* 353.

[111] Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument' (2003) 14 *European Journal of International Law* 437-480, at 456-457.

[112] Stephen Toope, 'Emerging Patterns of Global Governance', in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law*2000), at 98; Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument' (2003) 14 *European Journal of International Law* 437-480, at 449.

convincing justifications to the solution of normative problems.[113] Law therefore often does not, and cannot, work as a mediator between opposing claims. It is rather an outcome of discursive and political processes. A conflict does not become less political if it is discussed in legal terms.

However, it also appears that even though not as such able to function as mediating power, overcoming substantive disagreements in and by itself, law is a disciplining force that generates a particular language that is accepted in legal discourse and rejects all else. In addition to excluding what is not recognized as 'legal,' legality also exerts power by including and reinforcing arguments that adhere to the legal logic and are presented in legal language. Law is generalizable, which entails that it applies in like situations. By invoking a norm or precedent, argumentation can be recognized as legal and thereby acquire the force of law. Once an argument has been recognized as part of the 'legal realm,' it cannot be dismissed as merely wrong, but only by proving its illegality, challenging its similarities with the invoked precedent or the applicability of the invoked norm and arguing for its differentiation. But the argument as such has entered the arena of legal contestation, and thereby acquires persuasive force for those who align behind its reasoning. For example, Russia based its argument for occupying Georgian territories in 2008 on the need to protect Russian(ized)[114] subjects rather than, for example, declaring that Moscow was taking back what was once part of the USSR because they saw the opportunity to do so. Similarly, the US and UK presented the situation in Iraq as one as self-defense against pending attacks with weapons of mass destruction rather than arguing that they could use force because they wanted to and could. As Andrew Hurrell wrote, 'being in a political system, states will seek to interpret their obligations to their own advantage. But being in a legal system that is built on the consent of other parties, they will be constrained by the necessity of justifying their actions in legal terms.'[115]

When discussing a matter or situation in terms of law, circumstances and arguments that are not recognized by the legal discourse are dismissed as irrelevant. Things exist in and through the boundaries that delimit them from other things.[116] Each discursive topic (such as 'sovereignty' or 'aggression') is constituted by a conceptual opposition and understood as dichotomy, delimited by a rule that distinguishes the concept from

[113] See Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, 2005), at 69. See for a discussion on the relationship between law and politics and the inability of law to mediate between opposing claims also Nikolas Rajkovic, 'Rules, Law, and the Politics of Legality: Critical Sociology and International Law's Rule' (2014) 27 *Leiden Journal of International Law* 331-352.

[114] Russia provided Georgian citizens with Russian passports in the period preceding the 2008 annexation of South Ossetia and Abkhazia and subsequently argued that it was using force to protect Russian citizens under the legal argument of providing diplomatic protection. In international law, the right to provide diplomatic protection provides that states can take action against another state on behalf of its nationals whose rights have been violated by the other state.

[115] Andrew Hurrell, 'International Society and the Study of Regimes: A Reflective Approach', in Volker Rittberger (ed.), *Regime Theory and International Relations*(Clarendon Press, 1993), at 61.

[116] Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, 2005), at 16, citing Hegel.

what it is not. Law therefore dismisses a-legality, arguments that do not recognize the legal-illegal division. And it thereby generates a discursive dynamic that applies legal argumentation that is recognized as such and that is recognized as relevant to the situation at hand. It thereby disciplines actors to speak a certain language, the language of law. In order to be persuasive, governments and non-state actors are induced to justify their positions on grounds other than, for instance, national interests or morality and, instead, to invoke (an interpretation of) international law.[117]

The insights of critical legal scholarship thus help us understand the indeterminacy of law and how rather than being irrelevant, this instead enables law's influence on the political. This again enables the argument that is made in this book that the discourse and argumentative practices on use of force and aggression demonstrate the falseness of the presumed dichotomy of law *versus* politics. Rather than understood as one *versus* the other, law and politics interplay and co-constitute each other. In their complex interrelationship, law is both indeterminate *and* disciplines the political. As a consequence, they co-constitute each other in the (re)constitution and (re)shaping of the norm on 'aggression.' Through this dynamic and in search for law's disciplining power (despite and through) its openness, practice shows a consequential dynamic of seeking to delegate substantive resolution through the adoption of procedural norms and institutionalization. Moreover, rather than thus resolving substantive disagreement, contestation is entrenched: because of the indeterminacy of the norm, entrenchment of disagreement is deepened. To sum up the argument, the practices on use of force and on the construction of the aggression norm show:

1) that using the legal language disciplines the political sphere to certain extent;
2) that legalization and legal language do not overcome fundamental disagreements regarding the deeply contested issue of what is and what is not aggressive use of force;
3) that states' choice for law's disciplining force despite fundamental disagreement on substance leads to proceduralization; and
4) that this choice carries the consequence that disagreement may be entrenched through the power of legal language rather than resolved.

Sections 2.1 and 2.2 have introduced the first two aspects. Sections 2.3 and 2.4 introduce the third and fourth aspects, all of which are discussed in more detail in the context of the use of force discourse and the juridification of the notion of aggression in the next chapters.

[117] See Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publishers, 1991).

2.3 Seeking Discipline Despite and Because of Indeterminacy: Delegation and Proceduralization

Sections 2.1 and 2.2 argued that neither, on the one hand, the 'legalist' idea that the world of politics can be captured in law and that the politics can be suspended from it and replaced with neutral, objective and abstract rules that lead to just outcomes, nor, on the other, the 'realist' idea that international law is irrelevant because power politics will ignore law when it ultimately comes down to a choice, reflects the way law and politics interact in a particularly helpful manner. Understanding world politics and the role of law in it through the 'legalist' and 'realist' logics that place law and politics opposite each other, as one trumping the other, therefore fail to grasp the more intricate ways in which law and politics interact. Understanding politics as the negative counterpart of law *a priori* excludes the possibility that law may be part of the political, and understanding law as nothing *but* political cannot distinguish law apart from the political, and thus cannot adequately explain why political actors use legal argumentation to justify their actions.

In fact, instead of understanding 'law trumps politics' and 'politics trumps law' as a dichotomy and mutually exclusive, the practice of legal argumentation rather suggests that each logic tells part of the story. On the one hand, law is subject to political disagreement. It reflects the extent to which there is agreement, and is empty where there is none. On the other hand, law holds a disciplining power that limits as well as enables what can count as legal argument, what is recognized as speaking 'legal language'. The dichotomy is thus false where it presents the two logics as dismissing each other. Instead, this book argues that the relationship between law and politics is rather more helpfully understood in a way where instead both logics rely on each other. Though law in and of itself doesn't bring substantive resolution and mediating power, the language of law is sought because it at least brings a certain disciplining power, which includes and excludes what is recognizes as speaking 'legal language.' In the process, law and politics co-constitute each other by continually influencing how the 'aggression' norm is understood and how practice is read through aggression's normative framework, that again influences the development of the norm's meaning.

This dynamic of seeking to appropriate the disciplining power of law despite fundamental disagreement on its substance can be seen throughout the history of the regulation and criminalization of aggression. Chapter 4 discusses this discursive history in more detail, and what is seen there is that over and over, negotiation on where to draw the line between aggression and non-aggression fails due to substantive disagreement on what force should be regarded as aggressive and what not.

In the negotiations on the UN Charter, it was decided to use the notion of aggression and couple this to the system of collective security and Chapter VII, as a trigger for other states to use force against a state resorting to aggression. To that end, the

drafters of the UN Charter tried to define aggression, but failed, and decided to delegate this question for now to states and the UN Security Council to work out in practice, and to a working group that would work on a definition after the adoption of the UN Charter.

This left the drafters of the Statute for the Nuremberg Tribunal at the London Conference in difficulty: they needed a definition of aggression in order to prosecute the Nazi leaders for aggression while respecting the principle of legality, which prescribes that criminal law is only applied against an individual if such law is clear and was so prior to the individual's allegedly criminal actions. Yet, like the drafters of the UN Charter, the four victorious powers creating the Nuremberg Tribunal were unable to agree on where to draw the line between aggression and non-aggression. Because they were not willing to let go of the idea of prosecuting the Nazi leaders for aggression nevertheless, they decided that it would be up to the judges in the trials to work out in practice what aggression would mean exactly.

In these Nuremberg trials, however, like in the subsequent Tokyo Tribunal trials, the judges were of no such inclination. They left aggression undefined as well and found the Nazi and Japanese leaders guilty of aggression under the logic that even though it was not entirely clear what aggression was, it was clear that what these individuals had done was aggression nevertheless.

It was thus up to the UN again to define aggression, and it created working group after working group for this purpose, each of which stumbled upon similar substantive disagreement on what wars ought to be allowed or condoned, and what wars ought to be labeled as violations of the highest norms. It took until 1974 to create a draft text on which all states could agree. But this draft did not define aggression proper either. It gave an open generic definition, followed by a number of more specific examples, but crucially left the ultimate decision of whether or not aggression had occurred to the UN Security Council. The 1974 text provides that a state's illegal use of force may be considered 'aggression' if it is directed 'against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations,'[118] unless the UN Security Council concludes that a determination as aggression is not justified in light of other circumstances.[119] Moreover, Article 4 provides that the Security Council may determinate any other act to constitute aggression.[120]

In addition, the International Law Commission (ILC) explored options to come to a notion of criminal responsibility of the state itself for committing aggression, rather than an individual. Even though the ILC had considered giving to the notion of

[118] *Definition of Aggression*, UNGA Res 3314 (XXIX) (14 December 1974), art. 1.
[119] *Definition of Aggression*, UNGA Res 3314 (XXIX) (14 December 1974), art. 2.
[120] *Definition of Aggression*, UNGA Res 3314 (XXIX) (14 December 1974), art. 4, which follows a list of acts that are in principle aggression unless the Security Council decides otherwise (art. 3), and reads: 'The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.'

aggression a relatively prominent role in three of its projects, the ILC Draft Code of Crimes Against the Peace and Security of Mankind, the ILC Draft Statute for an International Criminal Court, and the ILC Draft Articles on State Responsibility, aggression was scarcely present or relevant in either of them in the end. The ILC members had not been able to reach agreement on substantively distinguishing between aggression and non-aggression and rejected the 1974 definition because it was too vague to serve as a basis for the prosecution of a crime of aggression.[121] In 1996, the International Law Commission adopted the Draft Code of Crimes against Peace and Security of Mankind, which provided for individual criminal responsibility with respect to a leader or organizer for the crime of aggression, based on the individual's participation in acts of aggression committed by a state.[122] However, the draft Code did not provide a detailed definition of *what* the crime of aggression entails, and it quietly dropped from its agenda.[123]

Yet when in the 1990s states negotiated the establishment of the ICC, aimed at prosecuting individuals such as state leaders for the most serious crimes of concern to mankind, aggression was viewed by many to be a natural and necessary part of this group of crimes. However, again, states could not agree substantively on what aggression was. Consequently, the Assembly of States Parties to the ICC included the crime of aggression in non-operational form in the Statute in 1998 and installed working groups for the purpose of finding agreement on defining the crime of aggression as well as developing a jurisdictional scheme to enable prosecutions in the future.

In 2010, at the ICC Review Conference in Kampala, Uganda, a consensus agreement on a crime of aggression amendment for the ICC Statute was reached, with the idea that, pending sufficient ratifications and a subsequent agreement in or after 2017, the ICC will have jurisdiction over the crime of aggression. However, the text again does not provide a substantively clear demarcation between aggression and non-aggression. Instead, it inserts a clause that provides that an act of aggression is only a crime of aggression if it constitutes a *manifest* violation of the UN Charter by its character, gravity and scale.[124] The insertion of this word 'manifest' resulted from deep contestation on which acts should and should not be included in the ICC's jurisdiction, and in this word, all sides found sufficient openness to maintain their position. Moreover, the provision was accompanied by a jurisdictional scheme that would allow those states that were particularly worried about an ICC scrutinizing their global armed activities to exclude themselves from the reach of the ICC where needed.

---

[121] Michael J. Glennon, 'The Blank-Prose Crime of Aggression' (2010) 35 *The Yale Journal of International Law* 71-114, at 79; See Report of the International Law Commission on the Work of Its 48th Session, U.N. GAOR, 51st Sess., Supp. No. 10, at 9, U.N. Doc. A/51/10 (1996); see also William Schabas, *An Introduction to the International Criminal Court*, 3rd edn (Cambridge University Press, 2007), at 135.
[122] *Yearbook of the International Law Commission* (Vol. II, Part Two, 1996), chap. II.D, para. 50.
[123] Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 151.
[124] Article 8*bis* Rome Statute.

Chapter 4 discusses these negotiation practices as well as the eventually adopted provisions in more detail to demonstrate where contention lay and how this dynamic unfolded. The point here highlighted is that during each of these marking points in the history of the notion of aggression, discussions on substance arrive at fundamental disagreement on where to draw the line between what does and what does not fall within the scope of the provision that is drafted. Moreover, in each of these situations, despite the indeterminacy of the notion of aggression, a legal approach is favored nevertheless.

Consequently, agreement is sought where it can be found: not on substance but on delegating the substantive decision elsewhere and on setting up procedural rules to arrange this; on creating the contours of a legal provision and deciding that it will be further discussed elsewhere, by judges, practitioners, states, working groups, and so on. For example, in the situation of the ICC's crime of aggression, agreement is sought on creating the contours of a criminal law provision that leaves the contested heart of the matter open, with a jurisdictional scheme and an institutional forum, and deciding that the judges will figure out what the past century of negotiation history could not, under the euphemistic motto of 'having faith in the judges.'[125]

The process of regulating and criminalizing aggression demonstrates a recurring dynamic of trying to capture substantive disagreement within a provision on which agreement can then be found. The idea was that through this turn to agreeing on procedure, hopefully substantive outcomes might be produced in the future, elsewhere. Or, in the very least, it took the substantive disagreement off the diplomats' table, where, at least in the short term, only deadlock seemed possible. The regulation and criminalizing of aggression thereby became an interesting display of a decentralization of the development of an indeterminate norm in society rather than in the diplomatic assembly, through an interaction of institutionalization and scholarly and public opinion; of a (re)focusing on achieving agreement on procedure rather than substance; of an appeal to judges, with their discretionary spheres of reasonableness and equity, for example. Yet it creates a crime for which the criminality of the core acts that fall under its scope is fundamentally contested, even if agreement could be found on a procedural mechanism.

2.4 Leading to Intensification and Entrenchment of Contestation

The discourse and argumentative practices that are discussed in further detail in the next chapters thus show that the notion of aggression is indeterminate and that nevertheless and because of this indeterminacy the (limited) disciplining power of law

[125] The call to have 'faith in the judges' was often used in Kampala to quell criticism by the commission leadership that led the effort in Kampala, and by Benjamin Ferencz when he took the stage in Kampala to give a motivational speech when contestation became rather openly visible.

is sought. Moreover, they show that from that, a dynamic arises in which the question of substantive clarity is delegated elsewhere and agreement is sought on procedural rules rather than substantive demarcation of what falls under the 'aggression' norm. Further, such legal constructs have their political effects and generate a particular kind of politics. When substantive contestation persists, yet the contending positions are given the tools to buttress themselves with *legal* argumentation (which as Chapter 3 illustrates is not too difficult), this contestation is entrenched rather than resolved, as each side now perceives itself as not only right, but also legally correct, and rarely is such a conflict resolved or overruled by judicial interference.

This entrenchment is generated by maintaining substantive disagreement while appropriating law's disciplining power on an issue that is deeply contested and for which the consequences of a 'wrong' rule are highly intense. The intensity is, first, already high due to the nature of the issue (use of force to protect one's way of life) and, second, further increases through regulation and criminalization. The issue is not only intense because of what is at stake but gets intensified by its legalization since either side can use the power of law against the other, and each entrenches in one's own position.

First, entrenchment of contestation occurs because of the high intensity of what is at stake, hampering the likelihood of compromise. In their criticism on the collective security system and the idea of adjudicating the problem of aggressive war, Carl Schmitt and Hans Morgenthau pointed to the intensity of the consequences of the 'aggression' norm. As was noted above, Schmitt understood 'the political' through a reduction of political actions and motives to the distinction between friend and enemy, the latter being understood as the other and the stranger.[126] Schmitt held that the enemy is the adversary that intends to negate the opponent's way of life, and therefore must be repulsed or fought to preserve one's own form of existence.[127] Schmitt asserted that the friend-enemy antithesis reaches the ultimate question of one's own form of existence, which are the most intense issue that can be at stake. Morgenthau also highlighted the intensity of the consequences of a rule that would be at odds with a state's own determination of whether it should resort to force, which led him to argue that arguments concerning the use of force or aggression were not matters that should be decided in a court of law. Not for any intrinsic impossibility, he held, but because the rights and duties that are at stake here will be overshadowed by the intensity of the feelings concerning its injustice.[128] Hence, in the view of Morgenthau, a conflict that is rooted in intense feelings of injustice requires a political solution, not a court of law. Accordingly, Morgenthau concluded that international law should not

[126] Carl Schmitt, *The Concept of the Political: Expanded Edition* (The University of Chicago Press, 2007), at 26.
[127] Carl Schmitt, *The Concept of the Political: Expanded Edition* (The University of Chicago Press, 2007), at 27.
[128] Hans Morgenthau, *Die Internationale Rechtspflege, Ihr Wesen Und Ihre Grenzen* (Noske, 1929), at 73-84; see also Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), at 442.

be applied to situations that were essentially political. Morgenthau did not argue that there was no law on the matter of intervention, but claimed that whatever that law was, 'it was irrelevant for an intelligent assessment of the events.'[129]

While it is hard and unnecessary for the purposes of this book to empirically assess the validity of such claims, what appears clear is that the question to resort to force comes to the very core of the state's abilities to protect its polity and people against external threats, and that a rule that limits this ability is difficult to compromise on since no rule will be perfect and any rule therefore enhances threats from beyond, even if it would decrease risk in general. The notion of aggression has had a long history in which law was considered and discussed as a (potential) tool to suppress and prevent its use as an instrument in international affairs. This has always been challenging because ultimately, even though states want to make sure that others cannot fight wars against *them*, they have not been willing to give up *their* ultimate and fundamental right to resort to force when perceived to be needed for self-preservation, or to protect vital interests or fundamental values. As the indeterminacy thesis of critical legal scholarship shows, however, the deep structure of international law promises to deliver both: the notion of aggression provides equal rights claims to formally equal states and promises both the freedom to be protected against another's aggression *and* the freedom to use force when needed for the 'good.' Therefore, the reasons for the difficulty of creating a system of adjudication of international aggression has not been a lack of insight into the horrors of war or into the need to address and prevent this, nor a lack of legal skillfulness, but the absence of consensus as to which wars are aggressive and which are legitimate. And at the same time, there is the belief that in certain situations, resorting to force is necessary, humanitarian and/or just. There is just no agreement on which situations this applies to and when this is not the case.

However, those resorting to force will almost invariably be convinced that their force is necessary, humanitarian and/or just, as the costs that are at stake when resorting to force are too high for deploying the military for lesser reasons. Using force means asking citizens to endanger their lives and subjecting the economy to the financial burdens of paying for the deployment of the military, it invariably causes death and destruction, and always affects diplomatic relationships. Using force is therefore presumably not undertaken usually without the absolute conviction that it is necessary, humanitarian and/or just, even if others disagree. The construction of a rule that delimitates what international law allows and condemns is therefore challenging, since such a rule inherently makes unlawful instances of resort to force that are fundamentally and intensely felt as justified. Any use of force rule therefore inherently struggles with finding acceptance and compliance. Due to the indeterminacy of the 'aggression' norm, no rule will perfectly align with what

[129] Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), at 481, referring to Hans Morgenthau, *A New Foreign Policy for the United States* (Praeger, 1969).

everyone considers necessary, humanitarian and/or just. In a moral pluriverse, such views differ in substance but the consequences of a rule that is perceived as 'wrong' are highly intense, since this rule negates what any state regards as its fundamental right: to protect its way of life when it comes down to it. Moreover, as Frederick Schauer explains, any rule will always include situations that the drafters did not intend to include as well as exclude situations that they would have wanted to have included.[130] Consequently, the over- and under-inclusiveness for any regulation of aggression inherently leads to allowing uses of force that (one finds) should not be allowed, and prohibiting and criminalizing use of force that (one finds) should not be prohibited and criminalized. No rule will be perfect and the consequences of a 'wrong' rule highly intense. Those partaking in the discursive process that assesses the aggressiveness of a resort to force will thus always challenge the acceptability of such a rule to states, both in legislative as in adjudicatory efforts.

Second, while entrenchment of contestation is apparent if what is at stake is felt so intense as to interfere with a state's ability to protect itself, or as Schmitt held even to negate a state's way of life, the process of regulation and criminalization of aggression *further intensifies* the matter. Through regulation, and thus the bringing of the matter into the realm of law, disagreement is no longer the holding of a different view but becomes an alleged 'mistaken understanding' of the law, entrenching positions rather than resolving disagreement if no one true answer is available. Criminalization takes this entrenchment to a next level. The morality that comes from international criminal law's presentation as addressing crimes that are inherently criminal and blameworthy, *mala in se* crimes, and only the most serious of those, adds a further moral layer to this disagreement. Not only is the position of the other disagreed with and an alleged mistaken interpretation of the law, it also represents evil: it tries to justify a crime that belongs to the most serious crimes of concern to mankind, and a crime against all, *erga omnes*. This further entrenches contestation, which, for example, may make negotiated settlement or compromise even harder to find. It moreover enables and generates a particular kind of politics, such a morality politics of the righteous and lawfare. Chapter 7 discusses the politics that is produced by this entrenchment and the consequences thereof further.

In the rise and rise of international criminal justice, we see what Andrew Ashcroft has argued to be an increasing 'tendency to assume that the only satisfactory way to respond to some sort of anti-social conduct is to create a new criminal offence.'[131] However, applying law, and particularly *criminal* law, requires the creation of a line to separate allowed from non-allowed behavior: in this case, a rule that distinguishes between (criminal) aggression and non-aggression. This requires a rather high degree of clarity on what is desirable and lawful and what is undesirable and unlawful.

[130] See on the over- and under-inclusiveness of rules, Frederick Schauer, *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press, 1991).
[131] Andrew Ashworth, 'Introduction', in Annika Snare (ed.), *Beware of Punishment: On the Utility and Futility of Criminal Law*(Pax Forlag, 1995), at

Applying not only *criminal* law but even *international* criminal law, which is reserved for the 'most serious crimes of concern to the international community as a whole,' to address aggressive war, presumes that there is universal, or near universal, agreement about the criminality of the underlying behavior.[132] However, discussions on use of force show that universal agreement over the criminality, culpability and punish-worthiness of the *actus reus* of the crime of aggression (i.e. the underlying behavior of the alleged perpetrator that is at issue in the prosecution) appears non-existing.

Qualifications like 'supreme international crime' and as one of the 'most serious crimes of concern' classify the crime of aggression as *malum in se*, a wrong in itself, by nature and inherently (distinguished from *malum prohibitum*, which is wrong because it is prohibited). As such, the rule distinguishing between aggression and non-aggression is presented as a reflection of what is morally right and morally wrong. However, in a moral pluriverse, societies differ on these norms. In the absence of an 'international community' based on shared values and viewpoints, applying criminal law to behavior perceived as *malum in se* in one society or part of the world but not in another is complicated. In this situation of contestation of morality and plurality of values, criminal law application thus requires political choosing and prioritizing between fundamentally disagreed upon ideas about the criminality of conduct. In this light, to what extent is aggression in fact the 'supreme international crime,' an atrocity crime and a violation of a *ius cogens* norm if there are disagreements over uses of force being either supremely criminal or, as its flipside, heroic, for humanitarian or defensive reasons?

Consequently, it is a remarkable choice to label such behavior a most serious crime or supreme international crime.[133] Such labeling, but more fundamentally, the bringing of this indeterminate notion of aggression within the realm of international criminal law, which presumes a system of shared morality against certain *mala in se* crimes, further entrenches contestation, empowering each side's claims with the language of 'the law' and an extra layer of morality derived from the classification of aggression as *malum in se*.

The different assumptions from which states approach the question of which force is aggressive, coupled with the fundamentality of the state's right to resort to force and the intensity of the consequences at stake in drafting a rule about legal and illegal uses of force, lead to a situation in which states are not easily induced to compromise and accept a rule that in the future may work against their interests. Whether or not this means that international law is inherently unsuited for addressing and preventing aggressive wars is not topic of this study. This would require an assessment of the

[132] Despite that the defendant and his allies may well continue to disagree.

[133] Many commentators have expressed critique on the classification of aggression as the 'supreme' international crime, including supporters of the crime of aggression amendment to the ICC, such as Claus Kress, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus' (2010) 20 *European Journal of International Law* 1129-1146, at 1134; Niels Blokker, 'The Crime of Aggression and the United Nations Security Council' (2007) 20 *Leiden Journal of International Law* 867-894, at 868.

effects of the criminalization of aggression on conflict in the world and its root causes, which would be of such complexity that it is hardly comprehensible as a scientifically feasible undertaking. However, what this study does try to achieve is to enhance the understanding of what the regulation and criminalizing of aggression brings about by highlighting the intricate ways in which law and politics interact in the practices surrounding the notion of aggression. And from this study comes the understanding that efforts to regulate and criminalize the notion of aggression encounter substantive disagreement on what *exactly* aggression is; that despite and because of the indeterminacy of the notion of aggression the legal approach is nevertheless preferred; that this appears to be to appropriate law's disciplining force even if only to limited extent; that this creates a dynamic in which legislative efforts turn away from substantive disagreement by delegating substantive solution elsewhere and focusing on finding agreement on procedural arrangements; and that this has as consequence that contestation is not resolved but may instead entrench and moralize disagreement, with at stake the increasing intensity of the consequences of a 'wrong' rule.

Having thus outlined and introduced the main conclusions drawn from this study for how law and politics interrelate with regard to the criminalization of aggression, the next chapters unfold how these conclusions were drawn. They discuss how the contemporary use of force paradigm reflects and produces substantive disagreement, how in this context the criminalization of aggression has taken form, and how this process produces a number of recurring dynamics that can be traced back to early historic thinking about the *ius ad bellum*, and what implications this has for the ICC's new crime of aggression.

3. LAW AND POLITICS IN 'USE OF FORCE'-DISCOURSE

At 2 o'clock in the morning of August 2, 1990, Iraq launched an invasion of Kuwait. Within days, Kuwait was abolished and declared the 19th province of Iraq. Saddam Hussein accused Kuwait of 'economic aggression' because he claimed that it was stealing Iraqi oil through 'advanced drilling techniques,' and was furthermore part of an international conspiracy against Iraq. After its quick and decisive win, Iraqi forces set more than 600 Kuwaiti oil wells on fire. The occupation lasted seven months. Even though the first Security Council resolutions did not use the predicate 'aggression' to condemn this invasion,[134] Resolution 667 condemned Iraq for having committed *acts of aggression*, specifically by the 'decision of Iraq to order the closure of diplomatic and consular missions in Kuwait and to withdraw the immunity and privileges of these missions and their personnel,' the 'acts of violence against diplomatic missions and their personnel in Kuwait,' the 'recent violations by Iraq of diplomatic premises in Kuwait,' and the 'abduction of personnel enjoying diplomatic immunity and foreign nationals who were present in these premises.'[135] There was not the required Security Council majority to call the invasion as such an act of aggression, but the Resolution did determine as aggression Iraq's attacks on diplomatic premises and personnel.

This determination of aggression has been almost unique. Even though the term 'aggression' was included in UN Charter when the UN was created in 1945, the General Assembly adopted a definition in 1974 to guide the Security Council and states on what the notion of aggression entails, and the post-WWII prosecutions and the inclusion of the crime of aggression in the ICC have marked it as an international crime, states have been reluctant to use the term 'aggression.' Only in four other instances than this Iraq/Kuwait situation has the Security Council used the term 'aggression' to qualify a violation of the prohibition to use force.[136] In other situations that may well had been qualified as aggression, it did not determine that aggression had occurred.[137] Likewise, the United Nations General Assembly and the

[134] UN Security Council Resolutions 660 (2 August 1990), 661 (6 August 1990), 662 (9 August 1990), 664 (18 August 1990), 665 (25 August 1990), and 666 (13 September 1990).
[135] UN Security Council Resolution 667, of 16 September 1990.
[136] The five situations in which the Security Council has used the term 'aggression' to qualify a violation of the prohibition to the use of force are: (1) acts committed by Southern Rhodesia against other countries, including Angola, Botswana, Mozambique, and Zambia (Resolution 326 (1973) and subsequent resolutions, 1973–9); (2) acts committed by South Africa against other countries in southern Africa (Resolution 387 (1976) and subsequent resolutions, 1976–87); (3) acts committed by mercenaries against Benin (Resolution 405 (1977)); (4) acts committed by Israel against Tunisia (Resolutions 573 (1985) and 611 (1988)); and (5) acts committed by Iraq against diplomats in Kuwait (Resolution 667 (1990), *Historical Review of Developments relating to Aggression* (2003), at 225-237. See also Niels Blokker, 'The Crime of Aggression and the United Nations Security Council' (2007) 20 *Leiden Journal of International Law* 867-894, at 887-888.
[137] See for a discussion for instance Niels Blokker, 'The Crime of Aggression and the United Nations Security Council' (2007) 20 *Leiden Journal of International Law* 867-894, at 887-888.

International Court of Justice have also been reluctant to use the notion of aggression.[138]

Qualifying a war as aggressive has always been highly contentious. The use of force practice that is discussed in this chapter also demonstrates that different legal reasoning lead to different determinations of use of force as either aggressive or not aggressive but lawful or at least legitimate. Finding agreement in the Security Council to determine a situation as aggressive, and thus finding agreement among the five permanent members and an additional four non-permanent members to reach the required nine consenting or abstaining votes, is difficult because different states view use of force situations differently, as was discussed in Chapter 2. However, as the Iraqi example shows, it is not impossible to come to a determination of aggression in the Security Council and in some, even though limited, cases, the ideal oft expressed at the creation of the UN of an international community that takes a collective stand against an aggressor has thus proven possible. Nevertheless, the invasion itself could not be determined as 'aggression' but only Iraq's actions against foreign diplomatic missions in Kuwait could. Furthermore, 13 years later, these same resolutions became the topic of fierce contention when they were interpreted differently as to whether or not they authorized force against Iraq in 2003.

This chapter takes a closer look at discourse and argumentative practices on use of force as they occur in the setting of the collective security system, but first traces the historical roots of this UN based collective security thinking. It thereby discusses the two most influential 'use of force'-traditions for contemporary 'use of force'-thinking: the 'just war'-tradition and the tradition that regarded war to be an 'institution of law.' The next sections discuss that in the just war tradition, use of force that was just was allowed but this relied on an assessment by an authority, on the basis of objectivity and universality, which failed to prevent warfare since the right interpretation and the right authority was contested. This led to the rejection of the just war tradition in favor of one that saw use of force as an institution of law rather than the inherently contentious notion of 'justness.' Every state for itself could decide whether its force was in conformity with law. This, however, stumbled upon the problem of too many authorities, and the absence of a normative framework. What followed was proceduralization through the creation of the UN and the Security Council, to which the authority to decide over the legality of force was delegated. This, however, re-channels the same historic discussions into the shape of contestation over how to interpret and apply the right to self-defense, how to interpret and apply Security Council resolutions, and whether a right to humanitarian intervention or a responsibility to protect exists. In these discussions, the openness of the norm as well as its disciplining power come to surface, as a product of the delegation of the substantive decision to the Security Council, through proceduralization of the norm in

[138] See for instance *Historical Review of Developments Relating to Aggression* (United Nations, 2003), at 237-264 and Niels Blokker, 'The Crime of Aggression and the United Nations Security Council' (2007) 20 *Leiden Journal of International Law* 867-894, at 881-886.

the collective security system, following centuries in which neither the idea of objectively determinable justness of force (just war tradition) or the idea of leaving it all to the subjectivity of states themselves (war as institution of law tradition) proved to be fruitful ways to address the problem of aggression.

Contradicting assumptions from these conceptually contradicting historical traditions on 'use of force'-thinking were fused together in the current UN paradigm. This offers little conceptual bearing for the notion of aggression and ample space for a rich argumentative practice to argue mutually exclusive positions on the basis of likewise sound legal reasoning. By discussing how contestation on use of force materializes in concrete situations of claiming self-defense, Security Council authorized force, and non-authorized humanitarian intervention, the chapter seeks to illustrate how both the substantive disagreement on what force is allowed as well as law's disciplining power materialize in the collective security system. Moreover, the performativity of the use of force norm thus developed in practice is noteworthy in the 'use of force'-discourse as well, as argumentative pathways are themselves invoked as precedent for new situations, as was seen recently in the Crimea and Georgian crises, for which Russia invoked the Kosovo precedent.

Understanding this argumentative practice contributes to understanding the normative foundations of the crime of aggression, which is based on and a reflection of contemporary understandings of what force may or may not be undertaken, is or is not deemed desirable, and therefore accords or not with dominant morality of what qualifies and not as *malum in se*. States, UN organs, academia and public opinion all play their part in the construction and reconstruction, the constitution and reconstitution of international law. Even if not necessarily employing judicial criteria, they all invoke, interpret or contest treaties, rulings of the ICJ, the UN Charter, decisions by the General Assembly and Security Council, and state practice, and thereby create and shape law in their practice.[139] This chapter addresses discussions on use of force. Because 'aggression' is a particular form of use of force, whatever issue emerges for use of force, is certainly also an issue for the notion of aggression.

3.1 Between 'Just War' and 'War as Institution of Law'

Where before, few *legal* obstacles barred the decision to go to war, in the feudal Europe of the late Middle Ages, increasingly, scholarship emerged on the justness and lawfulness of war, the *ius ad bellum*. With the writings of, among others, St Augustine, Thomas Aquinas, Vitoria, Francisco Suarez, Grotius, Samuel Pufendorff

[139] See for analysis on the Security Council as quasi-judicial actor, Oscar Schachter, 'The United Nations Legal Order: An Overview', in Christopher C. Joyner (ed.), *The United Nations and International Law*(Cambridge University Press, 1997), at Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument' (2003) 14 *European Journal of International Law* 437-480, at 452.

and Emerich de Vattel, the 'just war theory' gained influence in discussions about war, asserting that war could be undertaken when this was deemed to be just, as determined by the authority. According to the just war tradition, therefore, the question did not revolve explicitly nor exactly around the 'legality' of war, but on whether it was just. The 'just war'-tradition holds that war can be just, but only under certain circumstances and provided that a number of criteria are met. The requirement of '*auctoritas*' provides that not just anyone can engage in warfare justly. Only a sovereign authority can wage a just war. The '*personae'* requirement proscribes that only certain categories of persons are allowed to engage in the use of force, which can nowadays be recognized in international humanitarian law's obligation to be distinguishable as a combatant. Moreover, a just war requires a well-defined objective (*res*), that the force has to be waged in pursuit of a valid legal claim (*iusta causa*), and with the rightful intention (*animus*) .[140]

In just war theory, war is a mechanism to redress wrongs, an instrument of enforcement. Even though war may thus be offensive as well as defensive,[141] if a war meets the requirements of being just, it is allowed and not aggressive. St. Augustine, for example, wrote that even though wars are in principle unfavorable, a wrong inflicted by an adversary may require the waging of just wars.[142] Around 1600 years before these just war criteria were formulated by Thomas Aquinas in light of St Augustine's writings, Mo Tzu also distinguished between justified and unjustified warfare in his writings. Justified war was waged by the righteous ancient sage rulers to overthrow evil tyrants, Mo Tzu held.[143] It was not clear in these texts what the distinguishing criterion between justified and unjustified war was, but justified war was associated with supernatural signs, indicating that Heaven has given the ruler the mandate to resort to war to punish a wicked tyrant. In similar vein, the ancient Indian Sanskrit epic Mahabharata contains discussions about just cause for war, necessity and proportionality, and just means and weaponry. The core idea behind all these

[140] Stephen C. Neff, *War and the Law of Nations. A General History* (Cambridge University Press, 2005), at 49-68.

[141] In medieval writings, a war of self-defense was not regarded to be a 'just war' but nevertheless allowed as a natural and inherent right. Just wars were offensive, in the sense of that enforcement action is offensive. Although as Stephen Neff explains, all just wars were defensive in the very broad understanding of defending the world against being overcome by evil. But they were offensive in the sense that they could, when meeting the requirements, take place at some point in time substantially later than when the original criminal act had been undertaken. Neff explains that self-defense action was regarded as completely separate to just wars. John of Legagno and Bonet wrote about the two different legal regimes that surrounded them. Self-defense, for instance, did not require a *iusta causa* but was allowed (as an inherent right) against any attack, even a lawful one, and under any and all conditions, as an exercise of a primeval right of survival. However, self-defense was only allowed against an *ongoing* attack. Stephen C. Neff, *War and the Law of Nations. A General History* (Cambridge University Press, 2005), at 59-62.

[142] St. Augustine, *De Civitate Dei Contra Paganos, Book Xix, Para. Vii* (6 Loeb Classical ed., W.C. Greene transl., 1960), at 150-151. St. Thomas Aquinas developed this idea further and focused particularly on the justice of the causes of war and the rightful intention of the war maker, in St. Thomas Aquinas, *Summa Theologiae, Secunda Secundae, Quaestio 40, 1* (35 Blackfriars ed., 1972), at 80-83.

[143] Chapters 17-19 (called 'Against Military Aggression') of the text known as *Mozi*, which was probably written by successive groups of Mo Tzu's disciples and followers.

concepts of the justness of war is that a just war is a vindication of justice, in the sense of an instrument of enforcement against a wrong that is committed. They moreover all assume that it is objectively assessable who has a just cause to go to war and who is the aggressor. This is distinguished from the question of whether the inherently flawed human *can* actually do this. The just war tradition presumes the idea of one true answer to who is right and wrong in its claim of holding a just cause. Consequently, only one side can be justly waging war.[144]

Where conceptually the idea of a just war was appealing, it faced the practical problem that each was usually convinced of the justness of its own war, while there was no accepted superior authority on earth to govern over such disputes.

With the rise of the European nation states, the just war tradition lost some of its traction. With increased inter-state activity in the form of agreements and treaties, modern international law emerged. 'Sovereignty' and 'equality of states' gained a legal character, delimitating one state's rights against another's obligations and vice versa. In this context, the just war tradition faced the paradox that where each state was sovereign, and two sovereigns held opposite claims to what was just, one of the sovereigns must be wrong: a sovereign could therefore be wrong about the justness of war. This did not provide the guidance to the 'truth' that the idea of an objective justice promised. The just war tradition thus encountered the problem of 'authority,' and had no means to overcome challenges to whose authority and which interpretation represented the 'true' answer of what justness was. An alternative way of dealing with the problem of contesting interpretations of justice was sought in a recognition that there was no objective authority that could not provide a solution to the justness of war. 'Sovereignty' was constructed as something absolute, and with it subjectivity. States had no authority over one another. *Par in parem non habet iurisdictionem* provided that no state could judge another, including over whether another's wars were just or legal.

States were bound to honor agreements and the ideal was that they would try to resolve differences by peaceful methods. However, far from being illegal, war was seen as a policy instrument and a 'means of negotiation' in which states sought to find out what the real power relations between them were, and to conclude a peace treaty accordingly.[145] Hence, the just war tradition lost influence in favor of a use of force tradition that saw resort to force as an accepted instrument of foreign policy and international business. War became an 'institution of law,' in the sense of a well-established and structured custom, in which the right to go to war was understood as part of the realm of state power rather than notions of 'objective justice.'

[144] Or both sides are unjust. But the just war tradition does not conceive of a situation in which both sides are just in their resort to force.

[145] See for example, Adolf Lasson, *Princip Und Zukunft Des Völkerrechts* (Hertz, 1871). See for a further discussion on Lasson and contemporaries, Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), at 182-188.

For the proponents of this 'war as institution of law'-tradition, war posed a challenging conundrum. On the one hand, most of them were opposed to war, regarding it as a manifestation of primitive and destructive instincts, which international law should eliminate from the civilized interaction between men. On the other hand, they held that war was occasionally needed against another who disturbed the (moral or political) order or violated agreements , or to adjust the geopolitical situation according to changed power dynamics.[146] Realists like Von Clausewitz and Von Moltke focused particularly on the latter aspect and moreover held that war supports valuable traits as courage, unselfishness, honor, sacrifice.[147] Most liberals rejected such idealization of war, and, despite accepting its reality and sporadic need, focused on controlling war, decreasing the risks of war from the social normality of nations, and mitigating the consequences of war. It is in this tradition that the contemporary *ius in bello*, or international humanitarian law, developed: the rules that govern conduct *during* wartime. Coming from a rationale that, for humanitarian reasons, the effects of armed conflict should be limited, as well as from the realization that determining which side is the just one is often difficult and fundamentally disagreed upon, this body of law provides a framework of rules that protects *all* those involved in armed conflict: civilians, and to lesser extent combatants. Importantly, these rules equally apply to all sides, regardless whether force is lawfully or legitimately undertaken. Notwithstanding the need for war from time to time, this did not mean that the brutality that comes with war should be unlimited, the rationale went. Humanitarian behavior in war was regarded to be a matter of civilization.[148]

Hence, in this 'war as institution of law'-tradition, war was seen as a rule-governed resort to armed force for the settlement of disputes and an 'ordinary and expected feature of everyday international relations.'[149] The 'war as institution of law'-concept had its heyday in the European balance of power system in the 18th and 19th centuries. It assumes that it belongs to the prerogative of states to decide whether or not to go to

[146] Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), at 83.
[147] Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), at 83.
[148] In his discussion of the correspondence between Von Moltke and Bluntschli, Koskenniemi observes that despite the many differences they maintained, this was a matter on which both agreed, Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), at 84-85.
[149] Stephen C. Neff, *War and the Law of Nations. A General History* (Cambridge University Press, 2005), at 177 and 293. The war as institution of international law concept is to certain extent inspired by the writings of Thomas Hobbes. Hobbes argued that because the state of nature is a ruthlessly competitive world in which each individual and each state rightfully seeks to safeguard their own self-preservation, perpetual war is the natural condition between states, in Thomas Hobbes, *Leviathan or the Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil* (Thomas Hobbes, 1651). According to Hobbes, peace can be *created* through the skillful drafting of treaties and agreements between states, but peace is not the state of nature between states. In pursuit of their own safety, two states can be in conflict with each other with each having right on its side. This idea broke decidedly with the just war tradition. According to Hobbes, opposing sides could both be lawfully entitled to use force since both were exercising their natural right to survival. Hobbes held that if necessary for self-preservation, states are allowed to break treaty obligations and resort to armed force lawfully, see Thomas Hobbes, *De Cive* (Thomas Hobbes, 1642).

war, since any other decision-making body is unable to make universally just or 'right' decisions on whether or not to engage in warfare, and is thus unable to resolve the cause of the conflict.

Whereas in the 'just war'-tradition only one side can be just, namely the side that has a *iusta causa* (a just cause) to resort to force against an opponent in vindication of a right, in the 'war as institution of law'-tradition, everyone is equal and is allowed to judge for himself whether cause for war exists. The 'just war'-tradition entails a vertical relation between the law enforcer, the beholder of the just cause, and the enemy, who is a criminal and, as a consequence of his own wrongdoing, has to accept the measures that are used against him to redress the wrong. Instead, the 'war as institution of law'-concept provides for a horizontal relation between warring sides, between equal sovereigns, each holding the right to use force and equal belligerent rights. The enemy is a *iustus hostis*, a just enemy, separate from the idea of (vertical) criminality. Instead, the just enemy is the opponent who is equally fighting for his cause, to which he is entitled, even though there may well be conflicting views between parties on the substance of this cause.

In the 'war as institution of law'-war concept, war as law enforcement is rejected because, in accordance with *par in parem non habet iurisdictionem*, no sovereign is morally superior over another and can judge unilaterally where justice lies. Using force is therefore better regarded as a prerogative of a sovereign entity to execute policy than a form of law enforcement. It follows that in the 'war as institution of law'-concept, force is seen as part of the political toolkit of interstate interaction, whereas in the 'just war'-concept, use of force without a *iusta causa* is in violation of the highest norms. Consequently, in the 'war as institution of law'-concept, the enemy is seen as a *iustus hostis*, an equal, and one that holds the right to use force. It is a respectable opponent against whom a war is fought, in accordance with certain rules. On the contrary, the 'just war'-tradition, with its vertical relation between sides and the idea that justice can only lay on one side, holds the enemy to be wrong and a criminal: the aggressor. That reasoning can lead to a justification for war that, provided that there is a *res* or *casus belli* (a cause for war) and restricted by the necessity to do so, is virtually unlimited in order to eradicate evil, impose punishment, even towards regime change, and large-scale disempowerment.

Clearly, the two traditions rely on assumptions that are radically contradictory: justice is a subjective notion *versus* an objective notion; force is (unfortunately) a realistic part of political interaction and is thus accepted as political instrument but subject to certain rules *versus* force without just cause is in violation of the highest norms; sovereigns are equal and hold equal rights *versus* sovereigns relate in a vertical manner, depending on who is right and beholder of justice; an enemy is a respected opponent *versus* a criminal.

Yet, neither tradition offered a working instrument with which to suppress the problem of aggressive war. And neither provided a satisfactory scheme on how to

resolve the question of whether or not a certain use of force is aggression or not. Whereas in the just war tradition the answer was sought in an objective and universal notion of justice and therefore led to an irresolvable dispute between parties on its correct interpretation, the 'war as institution of law'-concept dismissed the idea of objective justice but could not reach a legal distinction between lawful use of force and aggression beyond particular state wills: all force that was willed by a powerful enough state was thus legal or beyond the realm of law. However, both traditions searched for a way to discipline politics, mitigate arbitrariness, and decrease the danger of aggression that intensified with increasing offensive capabilities.

3.2 The Collective Security System

Both traditions thus failed to provide use of force discussions with a meta-criterion on the basis of which to decide whether it was allowed or not. In the 'just war'-tradition, such a meta-criterion was sought in an objective notion of justice, for which an *auctoritas* (authority), such as a prince, could understand and declare whether there existed a *iusta causa* (just cause) and *casus belli* (topic of contestation) that justified the resorting to force. Because this faced the problematic question of whose interpretation of this objective notion of justice was correct, the 'war as institution of law'-concept rejected the idea of objective justice in favor of distilling the question of the aggressiveness of war out of the legal realm into the policy domain of states themselves, each sovereign and empowered to decide for themselves where justice lay. As this concept was likewise unable to satisfactorily diminish the risk of aggressive war in interstate relations, the contemporary UN based collective security system developed out of these two traditions, borrowing elements from both, in an attempt to overcome their respective weaknesses, and provide a better scheme to suppress and prevent aggression. Yet, since each of these traditions rely on mutually exclusive underlying assumptions, the contemporary collective security system thereby creates a structure that, logically speaking, cannot rely on one or another concept but instead draws from concepts and assumptions that appear to mutually exclude one another.

By combining these traditions, different assumptions collide on questions such as whether force can be resorted to in pursuit of national interest, or of community interest, for the spread of values, for the protection of human rights; on questions such as whether using force is an instrument of *law* enforcement (then what is this law and who interprets it?), or of (nationalist or rather international?) politics. Whether war requires a just cause or, instead, whether the fact that interests are at stake suffices. And that if it is the latter, whether this only justifies force if *vital* interests are at stake (then what are these?), or whether this is broader. Moreover, on who decides over what interests one can and cannot use force, and if, instead, a just cause is required rather than interests at stake, what counts as a just cause, and who decides this.

Arguments in these discussions are fused with a multiplicity of criteria, each of which is interpreted in different ways, depending on the assumptions that the argument relies on, which are related to, for example, the nature of world order, the function of use of force in the post-WWII constellation, and the binding power of international norms upon sovereign states.

What can be observed here, is that where the 'just war'-tradition allowed war on the basis of a justice determination of the authority but encounters the problem of the objectivity of this authority, the 'war as institution of law'-tradition therefore dismissed the idea of objective justice happens upon the problem of the absence of a normative framework and that since all states could decide for themselves to use force or not, the right of the strongest was the law of the land. Both led to warfare, neither was able to curb it satisfactorily. From it came the idea to create the League of Nations to institutionalize and proceduralize the question of the legality to resort to war. Having failed to achieve its primary task of preventing another World War, in the aftermath of the Second World War, a successor institution was created (the United Nations) with wider global representation and a clear mandate of its Security Council to manage collective security. The substantive question of the aggressiveness of use of force and the decision-making power to determine situations as such was delegated to the Security Council. As in particular Section 3.4 discusses, ,this procedural outset encounters many of the same interpretative battles that the preceding use of force traditions faced. However, with the adoption of procedural rules on *how to* deal with aggression rather than *dealing* with it, the question of the aggressiveness of use of force is still transposed to the realm of law. Consequently, law brings its disciplining power. Not everything is allowed, and not all arguments are recognized as valid: the proceduralization in the form of a Security Council to manage collective security rather than leave it to states themselves creates a new playing field, with new rules, that allows new arguments to gain force, and others to become irrelevant. Thereby, law creates new realities, but in these new realities, similar contestation takes place, although in new forms.

In the contemporary collective security system, the rules around the legality of the use of force are surrounded by grey areas of legal controversy and contestation.[150] Article 2(4) of the UN Charter as well as customary international law provide that use of force against the territorial integrity or political independence of another state is prohibited. There are two exceptions to this prohibition to use force, namely when the resort to force is in self-defense, in accordance with customary international law and Article 51 UN Charter, or when authorized by the UN Security Council under Chapter

[150] See for instance Andreas Paulus, 'Second Thoughts on the Crime of Aggression' (2009) 20 *European Journal of International Law* 1117-1128; Elizabeth Wilmshurst, 'Aggression', in Robert Cryer et al. (ed.), *An Introduction to International Criminal Law and Procedure*, 2nd edn (Cambridge University Press, 2010), at 322-325; Claus Kress & Leonie von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 *Journal of International Criminal Justice* 1179-1217; Claus Kress, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus' (2010) 20 *European Journal of International Law* 1129-1146, at 1140.

VII of the UN Charter. In order for a state to be allowed to resort to force in self-defense, the force that it is victim of must be an 'armed attack' that reaches a certain threshold of scale and effects.[151] Thus, there does not exist a right to use force in self-defense against just any use of force. Because it is not crystallized what the threshold exactly entails other than that the ICJ held in the *Nicaragua* case that this force required a certain 'scale and effects,' there is a grey area between use of force on the one hand and use of force that qualifies as an 'armed attack' and triggers the right to self-defense on the other. This chapter discusses in Section 3.4 in more detail how the right to self-defense, the scope of Security Council authorization and the question of the legality and legitimacy of humanitarian intervention cause discussions on what acts are legal and illegal. Discourse shows that the terms 'use of force,' 'aggression' and 'crime of aggression' are surrounded by grey areas and that there appear four distinguishable categories of uses of force: i) legal use of force; ii) illegal but legitimate use of force that is not aggression (which does not constitute a *manifest* violation of the UN Charter, in accordance with the crime of aggression amendment to the ICC Statute); iii) illegal and illegitimate use of force that is not a crime of aggression (which is not a crime of aggression because even though perhaps a 'manifest' violation of the UN Charter and illegitimate, it is not '*by its character, gravity and scale,*' a manifest violation of the UN Charter, such as, for example, a small border incident); and iv) aggressive use of force that qualifies as a crime of aggression.

Article 1 of the UN Charter provides that the core purposes of the United Nations include suppressing acts of aggression. The UN Charter delegates the power to determine the existence of aggression to the Security Council.[152] Although the primary responsibility with regard to the maintenance of international peace and security lies with the Security Council, the General Assembly may discuss any question or matter within the scope of the UN Charter, including the maintenance of international peace and security. The Assembly can make recommendations to the members of the UN or the Security Council,[153] provided that the Security Council is not itself dealing with the same matter.[154] Moreover, where the Security Council cannot fulfill its primary responsibility to address threats to international peace and security, the Uniting for Peace Resolution of 1950 provides the General Assembly with a complementary role to address threats to peace and security.[155] The Security Council can furthermore, through resolutions adopted under Chapter VII of the UN Charter, authorize the use of force of member states or under a United Nations command and control to maintain or restore international peace and security. In other words, the Security Council can authorize use of armed force to suppress aggression.

[151] International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Judgment, Merits, 14 I.C.J. Reports (1986), para. 195.
[152] Art. 39 UN Charter.
[153] Art. 10 and 11 UN Charter.
[154] Art. 12 UN Charter.
[155] Uniting for Peace Resolution adopted by the UN General Assembly on 3 November 1950, GA Res 337A, UN Doc A/1775 (1951).

However, the UN is also created and imagined as a site for global deliberation on issues broader than mere peace and security although this takes precedence. It therefore seeks to balance its peace and security decisions against the secondary aims it strives after on themes such as global protection of human rights, refugee and migration issues, the environment and sustainable development, the emancipation of women, gender equality and gender mainstreaming, economic relations and development, labor issues, the law of the sea, outer space, and transnational and supranational criminal justice. These issues often overlap, interrelate, correlate and clash, shaping the UN as a site for global deliberation on human development where cosmopolitan ideals are discussed and contended over this broad range of subject matters that characterize human interaction. *How* to maintain peace and security, through actions on these broad matters of global development, is, again, fiercely disagreed upon depending on the situation and circumstances at hand. Some argue that a responsibility to protect supports this aim, others that it undermines it fundamentally, and again others that sometimes it does and sometimes it does not, disagreeing on when it would or would not. Similarly, whether and which human rights to endorse, how to deal with migration and refugee issues, natural resources, the environment etc in order to achieve the aim of maintaining peace and security all bring fundamental disagreements on interpretation and prioritization to the table. It follows that discussions on use of force are inherently infused with aims and objectives that reflect this almost unlimitedly broad substantive field, with as many viewpoints on prioritizing one issue above the other and in what manner. Discussions on what 'the' aims of the UN become therefore increasingly confusing and scattered with increasingly specific discussion. Addressing and suppressing aggression is widely considered a core aim of the UN, yet discussions on how to do so quickly become infused with arguments from any and usually multiple of the above mentioned issues that the UN also aims to address, which all relate to peace and conflict in various ways.

Importantly, these scattered invocations of 'the purpose of the UN' occur also when discussions surround the question of whether or not a use of force is deemed a '*manifest* violation of the UN Charter,' which distinguishes between what constitutes a crime of aggression and what not. Chapter 4 discusses the crime of aggression amendment in more detail, but the point highlighted here is that thinking about the UN in terms of its aims and purposes is complex as it is created with all-encompassing ideals and aims to maintain peace and security and to manage the international relations between states and peoples, and based on conceptually contradicting underlying assumptions, allowing multiple lines of argumentations and, objectively, preferring none above another.

As important ideal of this larger cosmopolitan project, the collective security system – UN's system for the maintenance of international peace and security – was intended

to be comprehensive in its provisions and universal in its application.[156] A violating state was to be punished by all other states and a victim state to be protected by all. As it developed in the late nineteenth and early twentieth century, collective security was conceived as a response to the instability and dangers of inter-state violence and, in particular, to the problem of aggressive use of force by states. The idea was that states would come to the conclusion that aggression was not a rational choice when they faced the united opposition of the international community. The system of collective action had the consequence that violence was now labeled as either crime or enforcement. War was no longer a confrontation between 'just enemies' but a confrontation 'where justice and morality were assumed to be on one side, injustice and immorality on the other.'[157]

The model of collective security assumes that each member of international society is prepared to see an aggression anywhere as a threat to the peace and to view an attack on one as an attack on all. The model furthermore assumes that states are prepared to act decisively on this recognition even if such action is costly and goes against their more immediate short-term interests. The realist critics of the 1940s saw these assumptions as inherently flawed since they argued that its foreign policy interests determine whether a state responds to a particular act of aggression.[158] Consequently, states will only act according to the collective security model when that act fits the overall pattern of its foreign policy. Whether the realists are right in this assertion or not, history has shown that indeed these prerequisites for a successful collective security system have been and still are to a large extent absent.

Having experienced the weaknesses of both the just war tradition and the war as institution of law tradition, in the UN system, elements of both were joined together in an attempt to build a structure that better enabled the suppression of aggressive wars and the maintenance of international peace and security than its predecessor, the League of Nations, and previous power constellations like the Concert of Europe and the dominating empires before then. However, blending together these different traditions and thus conjoining seemingly mutually exclusive conceptual foundations is also challenging for the functioning of the collective security system. For example, it provides for sovereign equality of states as well as an authoritative body, the Security Council. It rests on assumptions of the equality of states and the idea that they themselves interpret what international law provides (*par in parem non habet iurisdictionem*) but also on the idea that the Security Council can overrule this

[156] Malcolm N. Shaw, *International Law*, 6th edn (Cambridge University Press, 2008), at 1235. See for a discussion on the collective security system and state practice of use of force, Claus Kress, 'Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force' (2014) 1 *Journal on the Use of Force and International Law* 11-54. See also, Hans Kelsen, *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems* (Steven & Sons, 1950).

[157] Andrew Hurrell, *On Global Order. Power, Values, and the Constitution of International Society* (Oxford University Press, 2007), at 418.

[158] See for a discussion of realist critique on the UN, Andrew Hurrell, *On Global Order. Power, Values, and the Constitution of International Society* (Oxford University Press, 2007), at 187.

presumption. It formally respects the right to neutrality, but in fact does not when the Security Council has taken side and all member states are obliged to cooperate with the UN in supporting this side. The collective security system thereby rests on a conceptualization that is fused with contradicting assumptions. This is not to say that there is something inherently wrong with that. Both traditional use of force-concepts were rejected for sound reasons: an objective idea of justice always fell subject to intense disagreement on whose interpretation of justice was right, and the right to war for each state that developed during the balance of power system led to unbridled power play by the happy few powerful at the cost of all and everyone else. Neither provided satisfactory schemes to suppress aggressive war; both led to intense conflicts, fought out through wars. To develop a new system appears therefore a rather sensible way of thinking. However, as conceptual and normative foundation of the crime of aggression, it may provide some rather fundamental challenges to the application of (international) criminal law, as is discussed further in later chapters.

In the contemporary 'use of force'-constellation, the collective security system, a violator of the prohibition to use force is to be condemned by all as aggressor and the victim state to be protected by all. Many scholars nowadays perceive the current legality of use of force concept as a modern version of the just war tradition.[159] Often, they point to the Security Council as the body through which, at least in theory, aggression can be distinguished from just wars and through which the world can unite against aggression and for justice. The Security Council is empowered to authorize armed force, thereby trumping the prohibition to use force, with the purpose to maintain and restore international peace and security, which is conceptualized as the default situation, comparable to how the just war tradition conceives 'peace' as its default position.

However, is this power of the Security Council *law* enforcement or a policy instrument? Problematic in terms of just war theory for regarding the Security Council's position as a supranational law enforcer, i.e. as the authority (*auctoritas*) of the international community, is that it merges the elements of *iusta causa* and *auctoritas* in one: a just cause to resort to force is in this situation whatever the authority *says* is a just cause. Even though the Security Council's role sometimes may appear to have 'authority' in a manner that resembles the '*auctoritas*' idea in the just war tradition, in the just war tradition, the right answer was thought to be derived from or given by natural or divine law, not *decided* by the *auctoritas* itself. The just war tradition's core idea of objective determination of just cause (derived from divinity, nature, morality, truth or what may) as a separate criterion from authority,

[159] See for instance Larry May, *Aggression and Crimes against Peace* (Cambridge University Press, 2008) and Larry May, 'Aggression, Humanitarian Intervention, and Terrorism' (2009) 41 *Case Western Reserve Journal of International Law* 321-340; Stephen C. Neff, *War and the Law of Nations. A General History* (Cambridge University Press, 2005); Michael Walzer, *Just and Unjust Wars. A Moral Argument with Historical Illustrations*, 4th edn (Basic Books, 1977); and, in a different way but also seeing the current use of force concept in just war terms, Hans Köchler, *Humanitarian Intervention in the Context of Modern Power Politics* (MG-Studio, 2001).

which only applies and acts in accordance with what is a just cause, is replaced by a subjective assessment by the authority itself. This is how just war tradition-based ideas on war slide into the 'war as institution of law'-tradition.

Furthermore, even if regarded as a form of law and law enforcement, it is not entirely clear where the Security Council derives its authority to enforce *law* from? The UN Charter, as its constitutive instrument, provides that, in order to ensure prompt and effective action by the UN, the Security Council has the primary responsibility 'for the maintenance of international peace and security.'[160] Moreover, Article 39 adds that '[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken (…) to maintain or restore international peace and security.'[161] However, to 'maintain or restore international peace and security' is not necessarily the same as to enforce law, and rather blends into the realm of policy decision-making to manage international order and stability.[162]

Nevertheless, to see the role of the Security Council and collective security system purely in terms of the 'war as institution of law'-concept and as instrument of (arbitrary) power politics is also problematic. International law provides that use of force is prohibited, and its exceptions are also regarded as well-established customary and conventional norms of international law. Notwithstanding the regular violations of these norms, to regard the collective security system as a political environment in which anything goes as long as the permanent members of the Security Council and a few other of its members so decide, would also be a misunderstanding of the current use of force system. Most international debates are framed by international law.[163] International law is all around, invoked and appealed to everywhere, and 'use of force'-discourse is dominated by statements on what the law does or does not permit. To legitimate its superior position on matters of war and peace, states in (and out of) the Security Council try to justify, substantiate and, at times, veil their subjectivity by invoking legal concepts not only derived from positive law but also from natural law, such as appeals to 'justice,' thereby portraying the role of the Security Council and/or powerful states as an objective enforcer of universal morality. We witness the move in opposite direction, from 'war as institution of law'- to 'just war'-based ideas.

Another example is the understanding of the concept of sovereignty. 'War as institution of law'-thinking highlights that in the UN system, states are equal and sovereign, respecting *par in parem non habet iurisdictionem*. It understands sovereignty as absolute. But this is problematic. Wherever sovereignty is invoked, it is usually quickly followed by contestation on what this entails. On the one hand

[160] Article 24, UN Charter.
[161] Article 39 UN Charter
[162] See for a discussion on the phrase 'to maintain and restore international peace and security' and the problem of equating the terms 'justice' and 'law' particularly Chapter 2 of Hans Kelsen, *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems* (Steven & Sons, 1950).
[163] See for a discussion hereof James Crawford & Martti Koskenniemi, 'Introduction', in Koskenniemi (ed.), *The Cambridge Companion to International Law* (Cambridge University Press, 2012), at 3-4.

'sovereignty' is invoked as if it would enable a state's unbridled exercise of power, including protecting its affairs with force when needed, while on the other, 'sovereignty' is claimed to limit all others' invocation of this same power as well as barring international law's power to limit sovereignty. Yet, if one understands sovereignty as the exclusive authority to decide over matters within the 'domestic jurisdiction,' and this includes border-crossing matters of migration, natural resources, economic markets, import and export, security, the environment, and the many other issues that lie at the root of conflict, then conflict cannot be avoided.[164] Sovereignty then cannot be upheld in an absolute manner without ultimately resorting to force. It stretches as far as and is limited by the exercise of power by others. Regarding 'sovereignty' as absolute can therefore ultimately only lead to conflict. As dissenting Justice Röling of the Tokyo Tribunal observed, states are living entities and as such they change according to changing circumstances, as do the relations between them. If every state is allowed to maintain the *status quo* as long as it suits them, and as long as there are no alternatives to peaceful change where change is needed, war remains as the only instrument to settle conflict.[165] In an international constellation with increasing interdependencies, the growing power of international organizations and the globalization of the economy, the idea of sovereignty as absolute is difficult to maintain. Yet, with accepting that 'sovereignty' is limited by another's exercise of its own (limited) sovereignty, and thus that sovereignty is relative, comes contestation about the limits of sovereignty, whose authority is recognized under what circumstances and how this authority is exercised. This appears at odds with the whole idea of sovereignty as connotation of supreme authority and therefore lack thereof by others. In the collective security system, sovereignty thus appears to be treated as both absolute and relative or relational.[166] Werner and De Wilde therefore suggest that rather than taking a descriptive approach to sovereignty, the notion of sovereignty is better understood as a claim of legitimation vis-à-vis internal and external competitors.[167]

The collective security system thus reflects principles and concepts from two different and, conceptually speaking, seemingly mutually exclusive use of force traditions, blending them together for pragmatic reasons, but therefore sacrificing conceptual clarity, in favor of creating discretionary space for morality considerations without detaching entirely from legality considerations. However, due to this sacrifice, it fails to provide discussions on the aggressiveness of use of force with a bearing to overcome fundamental disagreement. The desirability of such conceptual clarity for the suppression or management of war is an entirely different matter; history has proven that both the 'just war'-tradition and the 'war as institution of law'-tradition were unable to prevent unbridled warfare. Nevertheless, the collective security system has its own track record of warfare. Whether one or the other is better, is not an

[164] See for this point, B.V.A. Röling, *Strafbaarheid Van De Agressieve Oorlog* (Wolters, 1950), at 12.
[165] B.V.A. Röling, *Strafbaarheid Van De Agressieve Oorlog* (Wolters, 1950), at 12-13.
[166] Tanja Aalberts, 'Sovereignty', in Berenskoetter (ed.), *Concepts in World Politics* (Sage, 2015),
[167] Wouter G. Werner & Jaap H. De Wilde, 'The Endurance of Sovereignty' (2001) 7 *European Journal of International Relations* 283-313.

answer this study tries to answer. The point here raised it that by embracing contradicting assumptions that the fusion of these 'use of force'-traditions brings, it offers a platform for fundamentally different assumptions on the question of the aggressiveness of use of force. Discussions on the aggressiveness of particular uses of force therefore often collide in fundamental disagreements and seemingly unbridgeable differences of perspectives, despite a widely shared appreciation that aggressive use of force is undesirable and should be suppressed and prevented. This does not have to necessarily be problematic when the collective security system is regarded in its traditional function. For managing the world order and limiting warfare this combination may be the pragmatic and best way to achieve relative success. However, as conceptual bearing for a criminal provision under the jurisdiction of the ICC that seeks to bring justice, fair assessments of guilt, innocence and blameworthiness, and respecting due process, and thus to distinguish between aggressive and legitimate use of force in foreseeable manner, its contradictory nature limits its functioning as meta-criterion to guide the judges in their decision-making, and to guide states when contemplating to resort to force.

3.3 The Paradoxical Development of the Crime of Aggression and the 'Responsibility to Protect'-Doctrine

Chapter 4 discusses how in this collective security paradigm, the notion of aggression was developed into a normative framework through regulation and criminalization. Interestingly, while the diplomatic community, international civil society, and scholarship from political, philosophical, and legal orientation worked towards criminalizing aggression and sanctioning use of force through legal instruments, many 'humanitarianists' also sought out the legal framework to *expand* the possibilities to resort to force. They advocated for a norm that allows military intervention in a foreign territory on the basis of humanitarian concerns and to protect individuals from atrocity crimes. They argued for legal foundations to intervene in such situations absent a Security Council resolution and consent by the concerned state. Such humanitarian interventions became in recent times increasingly associated with the idea of a 'responsibility' upon other states to protect those individuals if such protection was not given by their own states: a responsibility to protect.

Those arguing for this right to intervene, or even responsibility to do it, posit that even though the UN system does not specify this in so many words, states are nonetheless either entitled or justified, or ought to be, to use force for humanitarian reasons. Humanitarian interventions are, however, highly controversial. The main reason for this is that it is particularly prone to abuse. When force is justified or lawful when *claimed* or *intended* to be for humanitarian reasons, this opens up a large argumentative space for using force, where, in fact, the UN system and its prohibition on using force were created to limit this argumentative space. Whose interpretation

and prioritization of human rights prevails? And whose conceptualization and interpretation of justice is leading? How many deaths suffice to justify such an intervention? What is the threshold of seriousness or gravity of the situations that is intervened in that justifies resorting to force, where such force most certainly brings death and destruction by itself, and usually leads to prolonged instability, insecurity and economic downfall?

Nonetheless, there are situations that are so severe that it becomes difficult to justify standing by and not intervene if intervening militarily appears the better option humanitarianly. Absent a Security Council authorization, however, such interventions remain illegal. Due to the power and voting structure of the Security Council, and its composition that reflects the world's fundamentally differing worldviews and geopolitical interests, proposals to intervene for humanitarian reasons rarely find the sufficient majority to secure such an authorization.

The discussions then often shift from a legal debate into a debate about morality.[168] Moral discomfort with situations in which intervening is illegal but believed to be a moral imperative, led to argumentative strategies and qualifications that sought a middle-ground. For example, the conclusion of the Independent International Commission that the 1999 NATO bombings on Serbia had been 'illegal but legitimate.' In the positivist and legalistic climate that characterizes much legal thinking, such a concept is inherently difficult to deal with. What does it mean that something is legitimate even though illegal? Where does this leave the prohibition to use force, and claims that this prohibition would be a *ius cogens* norm? How does this rhyme with the criminalization of aggression that is intended to limit states in their war campaigns?

In an effort to contribute to and guide this debate, in 2001, the Canadian sponsored International Commission on Intervention and State Sovereignty (ICISS) launched the idea that foreign states have a responsibility to protect individuals against their own governments.[169] This responsibility to protect doctrine, often abbreviated to R2P, is based on the premise that each individual state 'has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes of humanity.'[170] This is a responsibility that lies primarily on the state itself, but if failing to fulfill this responsibility, a derivative responsibility is said to exist for the international community and/or other individual states to intervene into the crime-committing or crime-allowing state.

[168] See on this observation, Jan Klabbers, *International Law* (Cambridge University Press, 2013), at 197.
[169] Gareth Evans & Mohamed et al. Sahnoun, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre, 2001); see also Gareth Evans, *The Responsibility to Protect. Ending Mass Atrocity Crimes Once and for All* (Brookings Institution Press, 2008).
[170] World Summit Outcome Document (2005), para. 138.

In addition to shifting the language from 'right' to 'responsibility,' the responsibility to protect doctrine refocuses and broadens the humanitarian intervention concept to the prevention of such crimes as well as to the rebuilding of war-torn societies, if necessary with long-term international presence.[171] It premises on the principle that state sovereignty implies responsibility, and that the primary responsibility for the protection of people lies with the state in which those people live or where they belong to. Moreover, the responsibility to protect doctrine asserts that where a population is suffering 'serious harm,' as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to stop or address it, the principle of non-intervention and prohibition to use force yield to the international responsibility to protect. The doctrine founds these assertions in the obligations that it regards to be inherent in the concept of sovereignty (in the sense of holding the obligation to protect those that fall under the sovereign entity), in the responsibility of the Security Council under Article 24 UN Charter which assigns the Security Council with the primary responsibility for the maintenance of international peace and security, in human rights obligations and in state practice. The responsibility to protect doctrine includes i) the responsibility to prevent, aimed at addressing both the root causes and direct causes of internal conflict and other crises that put populations at risk, ii) the responsibility to react, calling for a response to situations of compelling human need with appropriate measures, which may include coercive measures, including military intervention, and iii) the responsibility to rebuild, which is the responsibility to provide full assistance with the recovery, reconstruction and reconciliation, addressing the causes of harm that the intervention aimed at.[172]

Even though some commentators suggest or refer to humanitarian intervention and the responsibility to protect doctrine as providing a legal basis for using force absent a Security Council authorization in accordance with UN Chapter VII,[173] this is not

[171] Jan Klabbers, *International Law* (Cambridge University Press, 2013), at 198.
[172] Gareth Evans, *The Responsibility to Protect. Ending Mass Atrocity Crimes Once and for All* (Brookings Institution Press, 2008), at 38-43; Gareth Evans & Mohamed et al. Sahnoun, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre, 2001).
[173] For instance Michael Reisman & Myres McDougal, 'Humanitarian Intervention to Protect the Ibos', in Lillich (ed.), *Humanitarian Intervention and the United Nations* (University of Virginia Press, 1973), at 177. Reisman and McDougal argue that argue that humanitarian wars are not straightforward violations of Article 2(4) of the UN Charter since 'a humanitarian intervention seeks neither a territorial change not a challenge to the political independence of the state involved and is not only not inconsistent with the purposes of the UN but is rather in conformity with the most fundamental peremptory norms of the charter.' They argue that it is therefore 'a distortion to argue that it is precluded by Article 2(4).' Ciarán Burke argues that taking general principles of international law into consideration, a case for the lawfulness of humanitarian intervention can be made under certain circumstances, in Ciarán Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing, 2013). See also Antonio Cassese, 'Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 *European Journal of International Law* 23-30, although Cassese argues that even though resort to force may be justified from an ethical point of view and that a customary rule may emerge that would legitimize humanitarian intervention without Security Council authorization, he also submits

widely accepted as reflecting the current state of international law.[174] In the World Summit Outcome document in 2005, the responsibility to protect was expressly connected to the powers of the Security Council under Chapter VII, providing that, should peaceful means be inadequate and national authorities are manifestly failing to protect populations from atrocity crimes, states may take collective action if, *and only if*, authorized by the Security Council.[175]

While some still refer to the responsibility to protect doctrine as an 'emerging norm' towards humanitarian intervention as a third exception to the prohibition to use force,[176] most commentary understand the World Summit Outcome Document as expressly caging the responsibility to protect doctrine into the two recognized exceptions of the prohibition to use force, providing that force is only legal if undertaken in self-defense pursuant to an armed attack or if authorized by the Security Council.[177] Nevertheless, Anne Orford described the responsibility to protect doctrine as possibly the most significant normative development in international affairs since the conclusion of the UN Charter.[178] According to Orford, it changes the nature of sovereignty by providing a justification for putting states under international supervision. Sovereignty thereby becomes conditional and ultimately subjected to approval by the international community.[179]

Commentators and the diplomatic community struggle with how to limit 'undesired wars' whilst not limiting 'desired wars,' under the circumstances that what falls under this 'desired' category is not only very difficult to grasp as a concept because it is

---

that as a 'legal scholar' he observes that such interventions are 'contrary to current international law' (at 25).

[174] UN Secretary General, *Report of the High-Level Panel on Threats, Challenges and Change*, U.N. Doc. A/59/565 (2 December 2004) provides at para. 203 that '[w]e endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other largescale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.' It thereby explicitly provides that the responsibility to protect may only lawfully be exercised pursuant to a Security Council authorization. This was confirmed in paragraphs 138 and 139 of the UN General Assembly 2005 World Summit Outcome Document, UNGA Doc. A/60/L.1 of 15 September 2005. See also, for instance, Bruno Simma, 'Nato, the U.N. And the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1-22, at 6. However, Simma argues that even though humanitarian intervention without Security Council authorization is and will remain in breach of international law, the particular circumstances of a concrete case should influence not only the moral but also the legal judgment of such cases.

[175] UN General Assembly 2005 World Summit Outcome Document, UNGA Doc. A/60/L.1 of 15 September 2005World Summit Outcome Document (2005), at paras. 138 and 139.

[176] See for a discussion on the status of the responsibility to protect as an emerging norm of international law, Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 *American Journal of International Law* 99-120.

[177] See for instance Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument' (2003) 14 *European Journal of International Law* 437-480, at 471-473 for an explanation on how the Kosovo experience actually reinforced the role of the UN. The return to the Charter framework and uncontroverted legality was welcomed by virtually every country involved in the debate.

[178] Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011).

[179] Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011).

inherently difficult to predict the successfulness and consequences of most interventions, but also fundamentally disagreed upon. This struggle led to the development of the responsibility to protect doctrine alongside the criminalization of aggression. On the one hand arises a doctrine that calls for the use of force through humanitarian intervention that, in its wildest form[180] even may ignore a lack of Security Council authorization and forecasts and actively strives after the emergence of a third exception to the prohibition to use force, whilst, on the other, the criminalization of aggressive war condemns such resort to force as a violation of the highest norms. Absent clarity on distinguishing between aggression and non-aggression, on the one hand lies a pull towards allowing and even morally obliging ('responsibility') resorting to force that in certain situations could trump the prohibition to use force, and at the same time criminalizing this as supreme crime, among 'the most serious crimes of concern to the international community as a whole.'[181]

Those that try to marry the two concepts point to the 'manifest violation'-criterion in the crime of aggression amendment, which would distinguish between, on the one hand, those uses of force that are 'good' or desirable because it would include those wars that are pursuant to the responsibility to protect and thus addressing atrocity crimes, and, on the other hand, those that are wrong, because aggressive wars, sometimes under references such as 'you know it when you see it.'[182] But, as is discussed further in the next chapter, some interpret the manifest criterion as excluding everything that causes contention, limiting the crime of aggression to the very few instances in history where agreement over such determination was indeed widely shared, whilst others give an interpretation to manifest that includes some and excludes other contentious cases on the basis of humanitarian or defensive reasoning, which, the next section will show, are deeply contested. Those arguing that the responsibility to protect does not conflict with the crime of aggression argue that the manifest criterion is intended to separate those 'truly humanitarian' wars from those that are not. Yet, this opens up a radically indeterminate space for broadening the right to use force. A problem with the marrying of the two concepts is that it presumes that there is a universally correct way to distinguish between just and unjust wars. It rejects and ignores that 'justice' is an essentially contested concept, interpreted and understood in different ways by different societies and individuals.

[180] The 2005 High-Level Panel does limit the scope of the responsibility to protect doctrine to acting in accordance with Security Council resolutions (UN Secretary General, *Report of the High-Level Panel on Threats, Challenges and Change*, U.N. Doc. A/59/565 (2 December 2005), at para. 203). However, the responsibility to protect doctrine is often invoked to suggest a responsibility to intervene in absence of a Security Council authorization, and thus as an argument for a broadening of the exceptions to the prohibition to use force.

[181] Preamble, Rome Statute.

[182] A line that was used in Kampala more than once in response to questions on how to know what such a manifest violation of the UN Charter would be.

3.4 Contemporary 'Use of Force'-Argumentation

Neither the 'just war'-tradition nor 'war as institution of law'-thinking brought satisfactory ways through which to address the problem of aggressive war, and both encountered the problem of authority. The idea of one authority led to irresolvable disputes over which authority and how to interpret that authority correctly, and the idea of every state as authority led to irresolvable disputes because the lacking of a normative framework to choose between all these authorities. Unable to resolve either contestation over authority, the question of what force is allowed and what not was proceduralized in the collective security system and delegated to the Security Council. Yet there, fundamental disagreement on where and how to distinguish between aggression and non-aggression appears no less. The different assumptions that underlie the prohibition to use force materialize in the differences in application, interpretation and weighing of criteria that are invoked in the decisions to use force or condemn another's use of force. Even though most will agree that, at least to certain extent, nationalist and self-interest-driven rationales are relevant drivers in these discussions on distinguishing aggression from non-aggression, rarely do they blatantly arise in discussions and argumentative strategies. Any argument, even if made hypocritically, appears more likely to be successful if pure self-interest is masked, diffused or diminished, in favor of using legal language.[183]

The remainder of this chapter discusses the invocation of these criteria according to three categories of situations in which the question of legitimacy and lawfulness of resort to interstate force arises. First, when the right to self-defense is invoked; second, where the Security Council adopts a resolution under Chapter VII of the UN Charter that authorizes states to use force and states argue that their use of force falls under the scope and meaning of this authorization; and third, where no such resolution is adopted but one or more states (consider to) resort to force anyway, invoking humanitarian justifications. These argumentative structures demonstrate how in practice the conceptual blending of use of force traditions in the collective security paradigm materializes in contestation. It shows both the disciplining force of law as well as its openness, allowing for reasoning towards opposing positions even though both are based on legal argumentation. Moreover, law's disciplining force is visible in the constitutive or performative function of legal argumentation. By opening up space for and legitimating new lines of legal reasoning, such reasoning strategies create new realities by themselves again, as a recurring dynamic in which the legal language includes and excludes and constitutes new argumentative structures that include and exclude by themselves, and so forth.

[183] See Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument' (2003) 14 *European Journal of International Law* 437-480, at 454.

3.4.1 Self-Defense

The first category of resort to force in which different underlying assumptions on the notion of aggression materialize is self-defense. The right to self-defense is provided by Article 51 of the UN Charter as well as customary international law.[184] When analyzing discourse, there appear two, mutually exclusive, ways in which to interpret the right to self-defense: these are referred to here as the 'justice' and 'necessity' interpretations of the right to self-defense.

The 'justice'-approach can be seen in how the ICJ usually interprets the right to self-defense in its jurisprudence. In, for example, the *Armed Activities* case, the ICJ regards the right to self-defense as a derivation of 'justice,' in the sense of vindication of a violated right. In this perspective, an armed attack's attributability to a state is a prerequisite to the right to use force in self-defense.[185] In other words, the right to self-defense requires i) a previous violation of a right before self-defense can be lawfully exercised, ii) that this violation is attributable to a state, and iii) is grave enough, reaching a certain threshold of scale and effects, iv) before it qualifies as an 'armed attack,' v) which triggers the right to resort to force in self-defense. Accordingly, this reasoning understands the right to self-defense as an instrument of 'justice:' as an instrument to redress a wrong, in the sense of a right that is violated.

State practice, however, shows that states often take a different view, namely of the right to self-defense as a derivative of 'necessity' rather than 'justice.' Rather than requiring an attributable violation of a right which constitutes the right to respond, in this 'necessity'-view of self-defense, the right to self-defense exists when needed for self-preservation, irrespective of whether an attributable violation of a right has occurred. In this understanding, when an attack occurs or danger looms, force can be resorted to lawfully in self-defense, notwithstanding the question of whether the attack can be attributed to a (specific) state.

This plays out specifically in the situation of armed force by non-state actors against or threatening another state. Whereas the ICJ's justice-interpretation of self-defense does not grant a right to self-defense against non-state actors if it cannot be attributed to a state, many states respond against such violence with armed force nevertheless.[186] Rather than following the ICJ's 'justice'-interpretation, they seem to follow a 'necessity'-derived interpretation of self-defense, which does not require a previous violation of a right in the sense of a wrongful act by another state, but relies on the

[184] In its judgment in the *Nicaragua* case, the International Court of Justice held that under customary international law a right of individual and collective self-defense (of not identical, but very similar content) exists alongside Art 51 of the UN Charter. International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Judgment, Merits, 14 I.C.J. Reports (1986).
[185] See International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, 168.
[186] Tom Ruys & Sten Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence' (2005) 10 *Journal of Conflict and Security Law* 289-320.

need to use force in order to protect. The latter interpretation is comparable to how most domestic criminal legal systems provide for an individual's right to self-defense as a criminal law defense which is a justification for acts of individuals that would have been criminal under different circumstances. This right usually exists even if used in the absence of wrongful behavior or accountability (e.g. against an insane, and therefore not accountable, attacker). For example, to use force against non-state actors firing rockets from outside the territory which cannot be attributed to another state is thus illegal and may qualify as aggression in the 'justice'-perspective and lawful and not aggression in the 'necessity'-perspective. Contemporary state practice provides ample examples of situations where indeed states do resort to force against terrorist groupings.[187]

This distinction between a 'justice' and a 'necessity' interpretation of the right to self-defense also comes to the fore, although somewhat implicitly, in the discussion in the European Journal of International Law between Christian Tams and Kimberley Trapp on self-defense against non-state actors. Both recognize the distortion between the interpretation of the ICJ and state practice with regard to defensive use of force against non-state actors when their acts cannot be attributed to states. Where Tams suggests a modification of the standard of attribution to align state practice with a 'justice'-interpretation of the right to self-defense,[188] Trapp criticizes Tams' argument and instead suggests to deviate from the idea of defensive force only in response to a committed wrong by a state. She argues for a right to self-defense even in the absence of attribution, explaining how a necessity argument would work to reject the requirement of attribution in case of terrorist attacks.[189] In his subsequent reply, Tams rightly points out that both of their approaches are in danger of 'muddling the conceptual waters,'[190] although both seek to accommodate an observed discrepancy between the law as interpreted by the ICJ in the *Armed Activities* case and the needs for states to respond to attacks by non-state actors.

This necessity-interpretation or necessity-rationale of the right to self-defense should not be confused with the concept of necessity by which international law acknowledges that necessity is a prerequisite to the right to self-defense in general. Because self-defense cannot be punitive but is rather meant to repel an attack, any use

[187] See for an overview of such state practice and a discussion of the ICJ case law in this respect, Tom Ruys & Sten Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence' (2005) 10 *Journal of Conflict and Security Law* 289-320. Moreover, the US legitimizes targeted killings and other uses of force throughout the world on the basis of its Global War on Terror, under which umbrella force is used against allegedly terrorist groupings without the claim that this would be attributable to states and qualify as armed attacks. Where possible, the US does claim that the states on whose territory this force takes place have been consulted or agree to the use of force on their territory. Examples include the drone campaigns in Pakistan since 2004, in Yemen since 2002 and the bombing campaign that took place on 13 June 2015.

[188] Christian Tams, 'The Use of Force against Terrorists' (2009) 20 *European Journal of International Law* 359-397.

[189] Kimberley Trapp, 'The Use of Force against Terrorists: A Reply to Christian J. Tams' (2009) 20 *European Journal of International Law* 1049–1055.

[190] Christian Tams, 'The Use of Force against Terrorists: A Rejoinder to Federico Sperotto and Kimberley N. Trapp' (2009) 20 *European Journal of International Law* 1057-1062, at 1060.

of force in self-defense must be both 'proportionate' and 'necessary.'[191] The concept of necessity is of an exceptional character because it can only be invoked under extraordinary circumstances, 'provided that no other measures consistent with or less disruptive of the international obligations of the concerned state are available.'[192] The concept of necessity in international law is governed by specialized rules in the different functional regimes that have developed in the field of international law.[193] If there are none, Article 25 of the International Law Commission's Articles on State Responsibility provides that necessity may be invoked if it is the only way for a state to safeguard an essential interest against a grave and imminent peril and does not seriously impair an essential interest of the state or states towards which the obligations exists, or of the international community as a whole.

The concept of necessity plays an interesting role in international law. On the one hand, it is a vital condition for the application of certain international rules as well as the instrument through which wrongfulness of certain acts can be precluded when so needed. It thereby contributes to repairing the inherent over-inclusiveness of law, in the sense that law is always both over- and under-inclusive in that it includes situations that were not meant to be included and excludes others that were intended to be included.[194] On the other hand, the role of the concept of 'necessity' in international law is also somewhat disruptive, for some, because it allows the preclusion or justification[195] of acts that violate international obligations vis-à-vis other states and/or the international community. According to Allott, it is the 'most persistent and formidable enemy of a truly human society' which can 'destroy any possibility of an international rule of law.'[196] And Stowell, '…necessity strikes at the

[191] Jan Klabbers, *International Law* (Cambridge University Press, 2013), at 194.
[192] Tarcisio Gazzini, Wouter G. Werner & Ige F. Dekker, 'Necessity across International Law: An Introduction', in *Netherlands Yearbook of International Law. Necessity across International Law*(T.M.C. Asser Instituut, 2010), pp. 3-10, at 4-5.
[193] Article 55 Articles of State Responsibility read in conjunction with article 25 provides that where the responsibility of states is concerned, specialized rules on necessity would function as *lex specialis* over the provision on necessity in the International Law Commission's Articles of State Responsibility. For a study into the ways in which the concept of necessity functions in different functional regimes of international law and the role of Article 25 and general customary international law, see *Netherlands Yearbook of International Law. Necessity across International Law* (T.M.C. Asser Instituut, 2010), vol. 41.
[194] Frederick Schauer, *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press, 1991).
[195] It is not clear in international law whether the concept of necessity precludes wrongfulness in the sense that no breach of international law would have been committed, or that a successful plea of necessity means that it is a circumstance that excludes (or mitigates) international *responsibility* for the acts, but not takes away the wrongfulness of the behavior and thus the violation of a norm. See further, Tarcisio Gazzini, et al., 'Necessity across International Law: An Introduction', in *Netherlands Yearbook of International Law. Necessity across International Law* (T.M.C. Asser Instituut, 2010), vol. 41, 3-10, at 7-8.
[196] Philip Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29 *Harvard International Law Journal* 3-26, at 17 and 21.

very root of international society, and makes the preservation of the separate states of greater importance than the preservation of the community of states.'[197]

In the context of use of force and aggression, invoking 'necessity' means that extraordinary measures in the form of using force are justified in order to protect essential interests that are in danger of being irreparably damaged, unless the force is used, and provided that no other measures consistent with or less disruptive of the international obligations are available. Historically, the concept of necessity came from a discomfort with the right to self-preservation and its accompanied entitlements to take measures such as force to protect it.[198] The right to self-preservation provided a broad specter of justifiable measures, including resort to force, that made state interaction unpredictable and increasingly dangerous with the increasing destructiveness of weaponry due to technological advancements. Consequently, states tried to increase predictability by regulating the circumstances under which the right of self-preservation could justify the use of force. This occurred with the rules on prohibiting war and then prohibiting use of force. Part of these developments was the development of the notion of necessity that increased the threshold to justify protecting the value of self-preservation through resort to force.[199] However, the ICJ thus raised the bar further in the *Armed Activities* case, reasoning with a 'justice'-interpretation and thus requiring the state to know that it is subject to an armed attack that is attributable to a state before it may resort to force in response. In this approach, 'necessity' only comes in after, as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that state.[200] This is different from what state practice demonstrates and that can be described as a 'necessity'-reasoning, which does not require the (attributable) violation of a right in the first case, but triggers the right to use force itself when a certain threshold of danger is reached, rather than establish it as a violation which is then justified by a necessity defense.

The issue of self-defense against non-state actors is one example of the ambiguity of international law with regard to the right to self-defense. The disagreement on where to draw the line between what is and what is not allowed, which is crucial for

[197] Ellery C. Stowell, *Intervention in International Law* (John Byrne & Co., 1921), at 392-393, cited in Nicholas Tsagourias, 'Necessity and the Use of Force: A Special Regime', in *Netherlands Yearbook of International Law. Necessity across International Law*(T.M.C. Asser Press, 2010), pp. 11-44, at note 2.
[198] Nicholas Tsagourias, 'Necessity and the Use of Force: A Special Regime', in *Netherlands Yearbook of International Law. Necessity across International Law* (T.M.C. Asser Press, 2010), 11-44, at 13.
[199] Nicholas Tsagourias, 'Necessity and the Use of Force: A Special Regime', in *Netherlands Yearbook of International Law. Necessity across International Law* (T.M.C. Asser Press, 2010), 11-44, at 13-16. Tsagourias makes the argument that the formula *opinio iuris sive necessitates* is wrongly interpreted by the ICJ as 'a belief that the practice is rendered obligatory by the existence of a rule of law requiring it.' This focuses on the *opinio iuris* part of the principle, whereas it is derived from a situation of necessity. A better understanding of the *opinio iuris sive necessitates*-principle, Tsagourias holds, is to treat *opinio necessitates* as mutually empowering as *opinio iuris*, which recognizes that certain practices may arise out of necessity and that it is only later and through repetition that legal conscience (*opinio iuris*) develops with references to these practices, in the sense of being considered as acceptable behavior.
[200] Article 25 Responsibility of States for Internationally Wrongful Acts (2001).

knowing what is and what is not regarded to be aggression, moreover raises its head on the question of the *scope* of the right to self-defense. Is self-defense lawful only when the existence of a state is at stake, as Hobbes proclaimed,[201] or is the contemporary right to self-defense broader, namely when certain rights of the state are violated rather than only when the very survival of a state is threatened?[202] The ICJ holds that an armed attack by a state is required, which reaches the threshold of a certain scale and effects.[203] This is a lower threshold than 'state survival.' Even further down this line is for instance the argumentation of the US in the run-up towards the 2003 invasion in Iraq that self-defense was lawful on the basis of the terrorist *threat*. The Security Council was not persuaded that the links between Iraq and Al Qaeda were sufficiently tight (or even existent) to justify military action in self-defense. However, the debate on the lawfulness of self-defense has certainly shifted away from Hobbes' stance requiring that the very survival of a state is at stake. Consequently, it is arguable what the scope of the right to self-defense is. It is unclear which rights need to be violated to qualify for a lawful forcible response, and at what level of seriousness; whether economic interests also qualify, for example when a part of the banking sector suffers a cyber-attack; whether a private hostile takeover of a state's energy sector, a vital interest of any state, suffices; or when it turns out that the energy sector is then to be controlled by another, non-friendly, state. If the term 'vital interests' is part of the equation, what then is the scope of 'vital' in this context? And at which moment does resort to force become lawful in response to a threat of an attack that has not yet taken place, which for instance plays out in concerns about Iran's and North Korea's nuclear capability.[204]

In the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, the ICJ provided that 'the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.'[205] By recognizing the 'fundamental right' to survival, and thus a 'necessity'-interpretation of self-defense, this reasoning in the *Nuclear Weapons* Opinion contradicts the ICJ's own reasoning in the *Armed Activities* case, where, as discussed above, it took a 'justice'-interpretation that only acts that are attributable to another state can qualify as armed attack, thus triggering the right to self-defense.[206] They are mutually exclusive. Either a right to self-defense exists when

[201] Thomas Hobbes, *Leviathan or the Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil* (Thomas Hobbes, 1651); Thomas Hobbes, *De Cive* (Thomas Hobbes, 1642).
[202] For instance Gerhard Kemp, *Individual Criminal Liability for the International Crime of Aggression* (Intersentia, 2010), at 58.
[203] International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Judgment, Merits, 14 I.C.J. Reports (1986), para. 195.
[204] See on this point Lianne Boer, who explains that the alternate reliance of interpretations of the scope of the prohibition to use force and the right to self-defense on mutually exclusive standards of means and effects, lead to different legal qualifications for similar cases, Lianne Boer, ''Echoes of Times Past': On the Paradoxical Nature of Article 2(4)' (2014) *Journal of Conflict & Security Law* 1-22.
[205] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (1996), para. 96.
[206] International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, 168; International Court of Justice, *Military*

a state's survival is at stake, or it does not if instead the right to self-defense is contingent on the occurrence of an armed attack and its attributability to another state.

One may understand the *Nuclear Weapons* reasoning as concluding that the right to self-defense only exists when the armed attack on a state threatens its very existence. However, the Court's opinion can also be read to dismiss the limiting function of law entirely when the survival of a state is at stake, for instance when nuclear weapons come into play.[207] This would point to an understanding of international law as an instrument that may be put aside under certain circumstances, following an invocation of justice or necessity. A situation in which there is no law, where, beyond the legal-illegal discussions, a situation of a-legality exists.[208]

The legal category of self-defense is thus open to various interpretations and usages, as for example the responses to the terrorist attacks on the US on 11 September 2001 demonstrated. As Frédéric Mégret demonstrated, rather than abiding by the notion of self-defense against a single armed attack, it is far easier to argue for the lawfulness of military action if the action against which self-defense responds is stretched to a 'war' rather than an incident.[209] Self-defense that takes place weeks or months after the attack occurred may look dangerously close to reprisals, which, as forcible countermeasures, is illegal use of force under international law. Moreover, self-defense actions that occur before an unknown attack is not self-defense at all but aggression, unless an attack can be proven to have been impending.[210] Mégret shows that it therefore becomes easier to try to argue that an attack forms part of a larger, continuous situation, a war, which breaks the temporality boundaries, as it projects durability. The argument for self-defense is then taken out of the context of solely sanctioning the attack that occurred and is simultaneously a protection against the attacks that may occur in the ongoing situation of war.[211]

---

and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA), Judgment, Merits, 14 I.C.J. Reports (1986).

[207] See for a further discussion of interpretations of this ruling, Ige F. Dekker & Wouter G. Werner, 'The Completeness of International Law and Hamlet's Dilemma. Non Liquet, the Nuclear Weapons Case and Legal Theory' (1999) 68 *Nordic Journal of International Law* 225-247.

[208] This situation in which no law is applicable, no law that can restrict or constitute the situation, and thus occupies a space beyond law, a space of a-legality, is related to but distinct from Hans Lindahl's discussion on conduct that claims to be a-legal, in Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of a-Legality* (Oxford University Press, 2013). Where Lindahl points to the difficulty of law in dealing with *argumentation* that refuses to be reduced to norms, the *Nuclear Weapons* decision points to a *space* beyond law, a space that law is not capable of regulating. Markus Dubber holds yet another approach to a-legality, namely by discussing international criminal law as an a-legal ethos rather than body of law, suggesting that rather than dealing with legal-illegal, international criminal law is better understood as a policing mechanism, Markus Dubber, 'Common Civility: The Culture of Alegality in International Criminal Law' (2011) 24 *Leiden Journal of International Law* 923–936.

[209] Frédéric Mégret, ''War'? Legal Semantics and the Move to Violence' (2002) 13 *European Journal of International Law* 361-399.

[210] Jan Klabbers, *International Law* (Cambridge University Press, 2013), at 193.

[211] Frédéric Mégret, ''War'? Legal Semantics and the Move to Violence' (2002) 13 *European Journal of International Law* 361-399, at 376-377.

The elasticity of the self-defense argument was also portrayed in the discussions on Iraq that soon arose after the 9/11 attacks and led to the US/UK invasion of Iraq in 2003. US and UK officials first argued that existing UN Security Council authorizations relating to the 1991 Gulf War and the subsequent ceasefire (Resolutions 660 and 678) and the inspections of the Iraqi weapons programs (Resolution 1441) had already authorized the invasion. They moreover argued that a right to self-defense under customary international law existed to respond to the alleged possession and willingness to use weapons of mass destruction. Iraq's alleged possession of weapons of mass destruction and their alleged willingness to use them against the US and their allies were argued to suffice for reaching the standards required by international law, thereby stretching the 'imminence' requirement, which provides that the necessity for preemptive self-defense must at least be 'instant, overwhelming, leaving no choice of means, and no moment for deliberation.'[212] A threatened attack must thus be 'imminent.' Most commentators therefore hold that this excludes a claim to use force to *prevent* a threat from emerging.[213] Self-defense was also invoked by pointing to a (rather incredible) link between Al Qaeda and its 9/11 attacks and Saddam Hussein, then president of Iraq and long enemy of the US. The argumentation went that through the link between Saddam Hussein and Al Qaeda, their armed attacks, including on 9/11 and others, could be attributed to Iraq, justifying the resort to force in self-defense. A final legal avenue that was claimed relied on the idea of humanitarian intervention to protect Iraqi civilians from their oppressive government. The argument there was that despite absence of Security Council authorization, a humanitarian intervention in pursuit of the responsibility to protect individuals from their governments' atrocious crimes justified the use of force against Iraq.

When Deputy Legal Adviser to the UK Foreign Office Elizabeth Wilmshurst resigned in March 2003 in protest of the Iraq war, she declared that the war would not just be a violation of Article 2(4) of the UN Charter, and thus a breach of the prohibition to use force, but an act of aggression. In her resignation letter, Wilmshurst wrote:

> 'I cannot in conscience go along with advice - within the Office or to the public or Parliament - which asserts the legitimacy of military action without such a resolution [a second Security Council resolution to revive the authorization given in SC Res 678, MdH], particularly since an unlawful use of force on such a scale amounts to the crime of aggression; nor can I agree

[212] The *Caroline* formula provides that '[i]t will be for… [Her Majesty's] Government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation' and the action must not be 'unreasonable or excessive; since the act justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.'

[213] Elizabeth Wilmshurst, 'Chatham House Principles on the Use of Force in Self-Defence' (2006) 55 *International and Comparative Law Quarterly* 963-972, at 965.

with such action in circumstances which are so detrimental to the international order and the rule of law.'[214]

In the secret advice by Lord Goldsmith, the Attorney-General to Prime Minister Blair, on 7 March 2003 on the legality of the Iraq war, he suggested that a domestic case might be brought against the Prime Minister given that aggression was a crime under international law and therefore domestic law in the UK, and that it could also provide grounds for a case against the UK at the ICJ for violations of international law.[215]

On the one hand, the legal argumentative strategies to justify the Iraq war demonstrate the openness of the prohibition to use force norm. Skillful lawyers will pull in their creativity and use their platforms to try to persuade public opinion of their justifications, which vary in the criteria that are presented, and might well contradict in the normative bases that are pursued. A lawyer's job is to serve his client's interests by being as persuasive as possible, which does not necessarily require coherent and consistent reasoning. The argument of the protracted validity of Security Council resolutions is based on the conviction that such resolution is *required* to authorize force, which directly contradicts the 'responsibility to protect' argument that they also submitted, which argues that in situation of severe human need, no authorization is required. Likewise, imagining a link between Al Qaeda and Iraq to construe an attributability link to argue that thus an armed attack occurred that was attributable to a state and thereby a justification to use force in self-defense (the 'justice' interpretation) contradicts the argument that a right to self-defense exists to counter a threat that weapons of mass destruction exist and will be used ('necessity' argument). Arguments that are seemingly mutually exclusive are presented alongside each other, like they buttress each other's persuasiveness. And each of these arguments can be countered with similarly legal argumentation, from similarly contradicting normative foundations. What it in fact demonstrates is the openness and the elasticity of the norm.

The Iraq example also demonstrates the apparent appeal of legal argumentation vis-à-vis non-legal language. To claim that resort to force is legal is apparently more convincing or appealing than to claim that force is undertaken for other reasons. Concluding that Iraq amounted to illegal use of force, Claus Kress asserts that the debate about Iraq demonstrates that 'reasonable international lawyers are capable of distinguishing between an arguable case and a manifestly erroneous justification for a

[214] Letter of Resignation by Elizabeth Wilmshurst of 18 March 2003, released by the Foreign Office to the BBC News website under the Freedom of Information Act, available at http://news.bbc.co.uk/1/hi/uk_politics/4377605.stm, last visited on 17 June 2015.
[215] Attorney General Lord Goldsmith, Advice about the legality of war with Iraq given by the attorney general, Lord Goldsmith, to the prime minister, Tony Blair, on March 7, 2003, available at http://www.theguardian.com/politics/2005/apr/28/election2005.uk, last visited on 24 July 2014, paras. 32-34.

use of force.'[216] Now it is indeed true to large extent that there are more persuasive and less persuasive arguments, recognized as legally strong versus weak, as justifying reasoning or plainly wrong and unconvincing, which supports the (limited) disciplining power that law brings, but lawyers are often not intending to be 'reasonable,' which is left to the judicial branch. Instead, when presenting their legal argumentation, lawyers are supposed to be persuasive in order to serve the needs of their clients. And whether or not lawyers recognize the weakness of certain argumentation, this does not prevent them to make such claims if they believe they might add to the persuasive force of the argumentative strategy. Such claims may then be re-invoked by others in a next situation where such precedent comes in useful, and re-invoked in yet another, thereby contributing to the entrenching and persistence of such argumentation, weakening alternative understandings, perhaps strengthening the development of this interpretation into a customary understanding, but in any case, constituting new legal realities, which by themselves acquire performative functions. The openness of the law on self-defense thereby allows for law's disciplining power to include and exclude argumentative strategies, closing down legal avenues and opening new ones, generating a dynamic in which some arguments gain persuasive force and are used, while others cease to be.

The argumentative practices around the use of force in self-defense show that arguments for and against the right to self-defense in concrete cases are infused with differing assumptions, materializing in the invocation of differing criteria (and interpretations thereof) to legitimize the resort to force. These include necessity ('the need to protect against threat to survival or threat to interests') and justice ('vindicating a violated right, such as territorial integrity'), but also different interest positions (for example 'protecting interests that are or will soon become at stake'), and morality (such as 'Western values are being attacked and therefore "we" need to eradicate that danger'). They demonstrate the openness and elasticity of the norm and the potential this brings for argumentative strategies for and against justifying force on the basis of self-defense. Moreover, it demonstrates the disciplining power that law exerts, by including and excluding what is recognized as 'legal,' and thereby constituting new legal avenues and closing down others that generate performativity by themselves.

3.4.2 Security Council Authorizations

A second category of use of force in which these different assumptions interplay is when force is used pursuant to a UN Security Council authorization, in accordance

[216] Claus Kress, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus' (2010) 20 *European Journal of International Law* 1129-1146, at 1141.

with Chapter VII of the UN Charter.[217] The first issues that arise for resort to force while invoking a Security Council resolution include the questions of who determines the scope and mandate of a resolution, who interprets the resolution, and whose interpretation is leading. Since neither the Security Council nor the ICJ or another body usually steps in if a resolution is interpreted in different ways, it is in fact left up to the states that resort to force pursuant to such authorization to interpret the scope and meaning of resolutions. This issue played out for instance in the 2011 Libya intervention when Resolution 1973 was interpreted by several states to exclude the option of using ground forces in Libya while others argued that the authorization was more limited. Questions also arose on whether it authorized to supply military support materials or even weapons to the opposition to the Libyan government, and to what end the resolution authorized force, and specifically, whether it authorized using force to change the regime of Libya.

This issue of the interpretation of resolutions is closely related to a second set of issues that arise, namely for what reasons force is resorted to. Why is this Libya intervention deemed legitimate, and made lawful by adopting a SC resolution, and another, let's say Burma or Darfur, not, if the purpose for the Libya intervention was to protect civilians from harm, which was the most often mentioned reason for adopting the resolution?[218] If indeed it was to protect civilians, it may appear strange to allow only aerial attacks and not ground forces whereas the former causes much greater harm to civilians. But, some of those arguing for the interpretation of Resolution 1973 as excluding the use of ground troops then argued that the reason for excluding ground troops was to make sure that 'Iraq' didn't happen again, meaning that the international community was not supposed to occupy Libya as the US did in Iraq after its 2003 invasion. This type of argument allows a variety of reasons for the intervention, such as stabilizing the region, in the middle of the Arab Spring of 2011, but can likewise support the position that it was indeed done to stop the killings of civilians, and with equal merit that the reason was to change the regime and support a more favorable one for the intervening powers' interests.

The bombings in Libya continued until the regime was toppled and more than significantly aided this effort, and this campaign thus turned out to be one of regime change, whether this was every actor's purpose from the beginning of the operation or a 'mission creep' for at least some involved. However, not one of the reasons described above was 'the' reason, nor did all actors pursue 'a' reason, and they

[217] Although the UN Charter does not explicitly delegate the power to authorize states to use force to the Security Council, the relevant Charter provisions, general principles of international law and state practice support the development of the Security Council practice to authorize states to use force with the purpose of restoring or maintaining international peace and security. See for an analysis of this, Niels Blokker, 'Is the Authorization Authorized? Powers and Practice of the Un Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'' (2000) 11 *European Journal of International Law* 541-568.

[218] Security Council, *Security Council approves 'No-Fly Zone' over Libya, authorizing 'all necessary measures' to protect civilians, by vote of 10 in favour with 5 abstentions* (17 March 2011), available at http://www.un.org/News/Press/docs/2011/sc10200.doc.htm.

certainly did not agree on one of those. Instead, the intervention in Libya is a good example of the variety of reasons and assumptions that play a role in deciding whether or not resort to force is regarded legitimate. The protection of individuals, justice, the stability of the region, the *status quo* of geopolitical interests and power structures, the toppling of a regime holding deviant values, and self-interest are among those reasons. Each of those reasons may rest on one or several out of a variety of assumptions that underlie the notion of aggression, may it, for example, be related to the worldviews of those partaking in these discussions, the interests and power positions of those involved, or views on what a 'successful' intervention is under the circumstances.

For instance, the reason to intervene in order *to protect individuals* can come from a liberal cosmopolitan perspective that a harm done to any individual in the world is a harm done to humanity as such, and therefore humanity has the right, or even a duty, to intervene on its behalf.[219] It can also arise from a universalist perspective, namely that the values held by the Qadhafi regime and its methods used against its opponents, individuals, are inconsistent with the idea that human rights (and certain interpretations of these rights) are universal and applicable to all, and that this regime violates these rights that all have, and therefore needs to be fought and removed, on behalf of 'all.' Or, an internationalist assumption could entail that large-scale violence against Libyan individuals in the midst of a regional uproar needs to be halted, to prevent further regional and international instability and insecurity. Realists, on the other hand, may for example argue that the reason to protect individuals stems from self-interest, for instance because of their own domestic political consequences if their electorate calls for intervention. From any of such worldviews, argumentation on the 'protection of individuals' can stem from a 'justice' reasoning (vindicating a violated right of those individuals, of a people, of a part of humanity, of a region, the international community, of a(nother) state itself, etc) or grounded in a 'necessity'-logic (necessary to intervene for protecting certain values, for protecting interests, for protecting other humans, for protecting a status quo, etc).

The initial bombings in the Libya intervention are typically not regarded as a situation on which there is disagreement on its lawfulness. Due to abstentions rather than vetoes by Russia and China, there was a Security Council resolution that determined the existence of a threat to international peace and security and, invoking Chapter VII, authorized the taking of all necessary measures.[220] Since the Security Council therewith authorized the use of force to achieve the purposes set out in the resolution, the intervention was in principle widely understood as lawful. Yet, even though the Security Council agreed on issuing Resolution 1973 and authorizing use of force, once the bombings had started, disagreement became apparent on the interpretation of the authorization, how much support to the opposition groupings would be legal, and

[219] See for instance Larry May for the argument that the international community or humanity as such can be harmed by atrocious crimes and therefore has an interest in their suppression in Larry May, *Crimes against Humanity: A Normative Account* (Cambridge University Press, 2005), at 82.
[220] UN Security Council Resolution 1973 (2011).

whether armed support to facilitate the regime change fell within the scope of the Security Council resolution or not. Different assumptions that underlay the reasoning of protecting the civilians in Libya came to the fore in open contestation about the legality as well as legitimacy of the amount and type of force used. However, once a resolution is issued, in reality, the states that choose to act upon it interpret it as befits them. There is usually no *post facto* adjudication on the matter, not by an international tribunal, not by the Security Council, nor by an international community of states.

The role of the Security Council in the collective security system is an interesting one. If the members in the Security Council deem a resort to force either lawful or aggression, it thereby *is* lawful or aggression. This is a modern variant of the tension between authority and just cause, or, in the just war tradition's terms, *auctoritas* and *iusta causa*. To regard the Security Council as *auctoritas* is to equal whatever the *auctoritas* says with *iusta causa*, thereby abandoning the *iusta causa* as separate criterion. To regard states as 'second order'-*auctoritates* leads to the same problems that the just war tradition suffered from in the medieval period: too many interpretations and the absence of one authority to decide between them. The issue of disagreeing on the application and interpretation of resolutions thus maintains.

3.4.3 Humanitarian Interventions Without Security Council Authorizations

The final category, when force is used without Security Council referral and not in self-defense against an armed attack, is where there typically is a lot of disagreement on the *law*fulness of force. Despite scholarly contributions that argue that humanitarian intervention and/or a responsibility to protect is emerging or exists as a third exception to the prohibition to use force,[221] this is not the current state of international law.[222]

[221] For instance Michael Reisman & Myres McDougal, 'Humanitarian Intervention to Protect the Ibos', in Lillich (ed.), *Humanitarian Intervention and the United Nations* (University of Virginia Press, 1973), at 177. Reisman and McDougal argue that argue that humanitarian wars are not straightforward violations of Article 2(4) of the UN Charter since 'a humanitarian intervention seeks neither a territorial change not a challenge to the political independence of the state involved and is not only not inconsistent with the purposes of the UN but is rather in conformity with the most fundamental peremptory norms of the charter.' They argue that it is therefore 'a distortion to argue that it is precluded by Article 2(4).' Ciarán Burke argues that taking general principles of international law into consideration, a case for the lawfulness of humanitarian intervention can be made under certain circumstances, in Ciarán Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing, 2013). See also Antonio Cassese, 'Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 *European Journal of International Law* 23-30, although Cassese argues that even though resort to force may be justified from an ethical point of view and that a customary rule may emerge that would legitimize humanitarian intervention without Security Council authorization, he also submits that as a 'legal scholar' he observes that such interventions are 'contrary to current international law' (at 25).

[222] UN Secretary General, *Report of the High-Level Panel on Threats, Challenges and Change*, U.N. Doc. A/59/565 (2 December 2004) provides at para. 203 that '[w]e endorse the emerging norm that

However, despite its unlawfulness, there is reluctance among many to call humanitarian interventions without Security Council authorization 'aggression.' In the Syria situation, those that argued for military intervention in 2013 despite the absence of a Security Council authorization invoke the 1999 Kosovo precedent, when NATO bombed Serbia without being authorized. US President Obama used an interesting argumentation regarding the relation between use of chemical weapons and intervening, which became famously referred to as his 'red line'-statement. When Obama was asked whether he envisioned military intervention in Syria for the safe keeping of chemical weapons, he responded that '[w]e cannot have a situation where chemical or biological weapons are falling into the hands of the wrong people' and that a 'red line' would be crossed if they would start seeing chemical weapons being moved around or utilized, which would change his calculus, his equation.[223] This boils down to arguing that the prohibition to use force does not apply (or will be violated, or is justified to be breached) when chemical weapons are used or fall in the hands of 'the wrong people.' Or, as German Foreign Minister Westerwelle held, that the use of chemical weapons is a crime against civilization and that the international community should act when the use of chemical weapons is confirmed.[224] This appears to be an understanding that there is a point in time where circumstances could justify the setting aside of law, comparable to an interpretation of the ICJ's *Nuclear Weapons* opinion that law may not be applicable in its limiting function when the survival of a state is at stake, such as when nuclear weapons are in play,[225] as noted above. In this reasoning, there could be certain circumstances under which the prohibition to the use of force-paradigm does not apply. Bruno Simma, a former judge in the ICJ, wrote in 1999 (before he started at the ICJ) that the lesson that could be drawn from NATO's illegal bombing campaign on Serbia in 1999 was 'that unfortunately there do occur "hard cases" in which terrible dilemmas must be faced and imperative political and moral considerations may appear to leave no choice but to act outside the law.'[226] Simma thereby asserts that situations exist where the normative framework on use of force cannot provide for the better political and moral approach, suggesting that breaking the law and infringing the prohibition to use force,

---

there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other largescale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.' It thereby explicitly provides that the responsibility to protect may only lawfully be exercised pursuant to a Security Council authorization. This was confirmed in paragraphs 138 and 139 of the UN General Assembly 2005 World Summit Outcome Document, UNGA Doc. A/60/L.1 of 15 September 2005. See also, for instance, Bruno Simma, 'Nato, the U.N. And the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1-22, at 6. However, Simma argues that even though humanitarian intervention without Security Council authorization is and will remain in breach of international law, the particular circumstances of a concrete case should influence not only the moral but also the legal judgment of such cases.

[223] Statement US President Obama on 21 August 2012.

[224] Statement of German Foreign Minister Guido Westerwelle on 26 August 2013, Washington Post.

[225] See for a further discussion of interpretations of this advice, Ige F. Dekker & Wouter G. Werner, 'The Completeness of International Law and Hamlet's Dilemma. Non Liquet, the Nuclear Weapons Case and Legal Theory' (1999) 68 *Nordic Journal of International Law* 225-247.

[226] Bruno Simma, 'Nato, the U.N. And the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1-22, at 22.

or dismissing its relevance entirely, may be the better approach. Such statements, however, are difficult to rhyme with the understanding of the prohibition to use force as a *ius cogens* norm, i.e., a peremptory norm from which no derogation is permitted.

In situations where military intervention is considered despite the absence of Security Council authorization, the term 'justice,' or 'just,' is often among the reasons invoked for resorting to force and thereby functions as a criterion on which to determine the legitimacy of the use of force. However, it is usually unclear what is meant by 'justice' because it carries in itself also a variety of assumptions. Is justice an objective or a subjective notion? Social psychological and cultural differences prevail regarding what is considered justice, how to choose one interpretation of justice over another, and whose justice is taken into consideration at the cost of another's.[227]

The 'just war' use of force-concept dismisses this difficulty by understanding justice to be an objective notion. According to the just war tradition, if there is a just cause to use force, the war would not be regarded to be aggression. According to Vitoria, citing Augustine and Aquinas, 'the sole and only just cause for waging war is when harm has been inflicted.'[228] Vitoria cited Romans to explain that one 'may not use the sword against those who have not harmed us; to kill the innocent is prohibited by natural law.'[229] Resort to force was therefore only just and lawful if a sovereign responded to a violation of its rights by the opponent. A humanitarian intervention is, however, aimed at resorting to force in vindication of *other* people's rights, not in response to a harm against itself. Nevertheless, applying, for instance, a cosmopolitan worldview that recognizes 'humanity' as an entity that may hold rights would regard humanitarian intervention more favorable in just war terms. In that perspective, the protection of individuals that are victims of atrocities committed by their oppressive regimes can be regarded as a 'justice'-reasoning (in the sense of vindication of a right) since the harm inflicted upon individuals is a harm against humanity and thus providing the required valid just cause, as required by the just war tradition: humanity then would be harmed and its rights violated, and thus humanity (understood as an entity) could vindicate this violated right by intervening in the situation. For a typical realist, however, the world comprises primarily of sovereign states and it rejects the idea of 'humanity' as subject of international law and thus bearer of rights in this sense. In this view, the violation of the state's own interests may perhaps be seen as the harm being done, but not the violation of the lives of individuals as such. In other words, it does not fit in the realist's logic to regard human rights violations within

[227] Rawls also points out that 'no general moral conception can provide a publicly recognized basis for a conception of justice in a modern democratic state' in John Rawls, 'Justice as Fairness: Political Not Metaphysical' (1985) 14 *Philosophy & Public Affairs* 223-251, at 225. See also Duncan Ivison, 'Justifying Punishment in Intercultural Contexts: Whose Norms? Which Values?', in Matt Matravers (ed.), *Punishment and Political Theory*(Hart, 1999), p. 88, at ; and studies on (procedural) justice in social psychology and criminology, such as E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988).
[228] Francisco Vitoria, *Political Writings* (ed. by Pagden and Lawrence, 1991), at 303.
[229] Francisco Vitoria, *Political Writings* (ed. by Pagden and Lawrence, 1991), at 304.

another sovereign state's borders as *iusta causa* for intervention, and thus as a valid legal claim by another state to justify using of force against another sovereign state.

In the end, it comes down to the question of how justice is perceived. The just war tradition's objective notion of justice as distinguishing criterion between lawful use of force and aggression was already contested many centuries ago, predominantly because it is impossible to apply this criterion in practice,[230] and these criticisms are no less applicable today. Usually, both parties are convinced of the justness and validity of their own claims. Who is to judge the justness of the cause, the validity of the legal claim, and whether the 'law-enforcer' had a rightful intention and not a personal vendetta? Vitoria already admitted that due to ignorance of fact or law, both sides can be genuinely convinced of the justness of their cause.[231] In response to the just war tradition's objective understanding of justice, the 'war as institution of law'-use of force concept dismissed justice or equaled it with state will. However, dismissing morality as irrelevant just because there is disagreement on what it provides, and thus leaving the question of whether or not to resort to force to calculations of interest only, was also widely rejected as means to resolve this matter.[232]

The ways in which justice is appealed to in the current understandings of the use of force cannot be reconciled comfortably with either the 'just war'- or the 'war as institution of law'-position, but at the same time assumptions related to both are recognizable. If justice is invoked to justify resort to force against another state it suggests that it is a universal value with universal meaning, but at the same time recognizes that not all sovereigns can make the accurate assessment of where justice lies, because there exists a prohibition to use force unless the Security Council so authorizes. It however does assume that the Security Council members, which are states, *can* decide whether the concept is applied accordingly, and thus suggesting that there *is* a method to know where justice lies. A legal approach to the use of force by invoking justice therefore finds itself tied between the idea of a normative sense of justice that overrides individual state will and the idea of a state's will as determinant of what justice is. Or to put it in the words of Koskenniemi, between apologism and utopianism.[233]

---

[230] Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), at 68-71. Koskenniemi points specifically to John of Legnano, Honoré de Bonet, Christine de Pisan and Vitoria, who developed a more practical body of law concerned with war rather than the more abstract just war doctrine.

[231] Francisco Vitoria, *Political Writings* (ed. by Pagden and Lawrence, 1991), at 313. Vitoria explains: 'where there is provable ignorance either of fact or of law, the war may be just in itself for the side which has true justice on its side, and also just for the other side, because they wage war in good faith and are hence excused from sin.'

[232] See also Hedley Bull, 'Natural Law and International Relations' (1979) 5 *British Journal of International Studies* 171-181, at 180.

[233] Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, 2005).

Another way to regard some of these motivations for humanitarian intervention is to look at them as motivated by a *necessity* to intervene rather than *justice*. As was already observed previously in this chapter, like justice, the concept of necessity is indeterminate in itself. With regard to humanitarian intervention, necessity can be invoked to intervene, for instance, because there is conceived to be a necessity to protect individuals from human rights abuses, or a necessity to protect the stability of the region, or of the international community, or a necessity to protect the interests and *status quo* of those that have the power to decide over the resort to force and can get away with it. These interests may, for instance, be geopolitical or economic, but may also be based on security concerns and stability, or on a moral necessity to prevent atrocity. A certain regime may be found better fitting with one's interests (Ouattara rather than Gbagbo in Ivory Coast, the Libyan National Transitional Council rather than Qadhafi, Karzai rather than the Taliban in Afghanistan), more favorable regarding trade in vital resources such as oil (Iraq, Libya), an uprising may be considered to cause very serious concerns to a precarious and/or essential stability in a region (Kosovo in 1999 just after the Balkan war had ended, Libya in the midst of the Arab Spring, Mali in 2012/13), or it is deemed morally excruciating to witness and stand by when atrocities against a civilian populations occur (Libya, Darfur, Burma, Syria). On the contrary, it can also be found to be necessary *not* to intervene for geopolitical stability, as for example appears to be the situation of not using military means but mere economic sanctions against Russia's annexation campaigns in Georgia and Ukraine. In his speech on 15 March 2015, Putin indeed hinted that it had been ready and willing to use all means, including nuclear, if other states would have stopped Russia's annexation of the Crimea. Russia itself, however, again claimed the necessity to intervene in these situations to protect compatriots, following the responsibility to protect logic, and invoking Kosovo as precedent.[234]

[234] Speech Russian President Putin delivered on 18 March 2014. Full English translated text available at http://en.kremlin.ru/events/president/news/20603 (last visited on 13 May 2015). Moreover, and diverting from his 'humanitarian reasoning,' Putin claimed the necessity to act in Crimea in order to protect Russian sovereignty. He said, '[i]f for some European countries national pride is a long-forgotten concept and sovereignty is too much of a luxury, true sovereignty for Russia is absolutely necessary for survival' (Speech Russian President Putin delivered on 4 December 2014. Full English translated text available at http://en.kremlin.ru/events/president/news/47173 (last visited on 13 May 2015)). Interestingly, on 15 March 2015, Putin somewhat diverted from this humanitarian and necessity reasoning by claiming that it was right to annex the Crimea as it historically belonged to Russia. In his speech on 18 March 2014, he had also commenced his speech by stating that Crimea has always been an inseparable part of Russia, and that Russia was not simply robbed but plundered when Crimea ended up being part of Ukraine after the USSR fell apart. Moreover, in his speech of 4 December 2014 in which he looked back on 2014 he commemorated the year as seeing the 'historical reunification of Crimea and Sevastopol with Russia.' It is not entirely clear whether this is intended to be a *legal* argumentative strategy to invoke a historical claim as providing a lawful claim on another territory or merely a political statement that Russia experienced the situation as such. Whether this argument is thus developed as a legal argument buttressed with legal sources thus remains to be seen at this point. However, if this leads to an argumentative strategy in which it is claimed that Russia had the legal right to annex Crimea based on its historical unity, this allows an extremely open space for annexation policies, as history has seen many shifts in territorial boundaries. This would therefore provide many states with claims for lawful annexation without committing aggression, or so the argument would go.

3.4.4 Invoking the Notion of Aggression: Between Discipline and Indeterminacy

States thus readily invoke law and employ legal argumentation to buttress their claims on the legality or legitimacy of resort to force that they support, and on the aggressiveness of the force they condemn. Yet, any reason that is invoked to justify a resort to force stumbles upon the consequences of the elasticity and indeterminacy of the notion of aggression and of the related notions of justice and necessity. Since the underlying assumptions regarding the function of the use of force and the nature of international relations are contradictory, there exists fundamental disagreement on the applicability, relevance, interpretation and weight of the criteria that are invoked for determining the lawfulness/legitimacy or aggressiveness of use of force are applied. In recent state practice, criteria such as necessity, justice, national or regional interests, power politics, *status quo* protection, and stability play undeniable roles in the choice to resort to war or not. Which criteria play a role for which actor and under what circumstances, and how much importance they are given in relation to other criteria, forms a web of complexity that challenges an abstract legal distinction between justified use of force and aggressive use of force.

The invocation of legitimacy and legality criteria in state practice of use of force show how differing and contradicting assumptions that underlie the notion of aggression complicate the application of international *criminal* law. There is a multiplicity of criteria (and interpretations thereof) that is applied to the decision to resort to force and determination of aggression, but there is no meta-criterion that actors agree upon to guide which criteria to use and how to weigh them against each other. What follows is a complexity of conceptual frameworks with internal inconsistencies and the absence of one, coherent underlying use of force concept.[235]

This does not provide too much difficulty for applying international law and international criminal law to clear cases. These are when there is an obvious situation of use of force of serious proportions, without any (reasonable) justification that is recognized in this international law-paradigm as relevant, or when the Security Council would have determined that a certain situation comprises aggressive use of force. But rarely are cases that clear-cut. Usually, there is disagreement on whether or not the use of force is aggressive or legal and/or legitimate. In those situations, this complexity of assumptions create a situation in which it is not predictable, in an abstract legal sense, to determine under which circumstances force may lawfully be resorted to or not.

Notably, discussions on using force are mostly held in the legal language rather than in non-legal terminology, such as, for example, morality, religion, or economic or

[235] The aspect of inconsistencies within and between conceptual frameworks and argumentative practices is further developed in Marieke de Hoon, 'Collateral Damage from Criminalizing Aggression? Lawfare through Aggression Accusations in the Nagorno Karabakh Conflict' (2012) 5 *European Journal of Legal Studies* 40-61.

political interest. The creativity of the best lawyers is used to try and construe claims in a language that can be perceived and tries to persuade the audience as the 'right' interpretation of what law provides. As noted before, now that the use of force-discourse has moved away from the realm of policy and has become legalized through the prohibition to use force and the criminalization of aggression, it excludes argumentation based on non-legal grounds. However, it also excludes situations that are not recognized as meeting the constructed definition of aggression or legality of the use of force. For example, situations that are regarded as internal armed conflicts are not classified as falling under the definition of the prohibition to use force. Even though regret may well be expressed on the violence that occurs, calls for respecting international human rights norms may arise in newspapers and other public opinion domains, and international humanitarian law is to certain extent applicable, by limiting the scope to being only applicable to inter-state force, the question of whether a power may use force against entities not recognized as states is excluded from the aggression and use of force paradigm. Arguably, some of the largest violence campaigns, such as the renewed escalation on the Gaza and sectarian violence in Iraq and Syria in 2014 and 2015 are thus excluded from the legal/illegal use of force discussion, and consequently also from the notion of aggression.

Law's power thereby includes and excludes situations as being recognized by law and being argued in legal terms and according to the rules on particular legal norms, depending on how rules are defined and how situations are qualified. Contingent on whether one perceives a situation as international or internal, as against a state or non-state actors, as invoking moral 'humanitarian' reasons, or as 'law enforcement' reasons (the drone strikes in Waziristan, as fighting against terrorism, and claimed as invited by Pakistan), the legal paradigm of use of force is recognized as applicable or not, and the situation may fall under the crime of aggression or not. Moreover, what was observed in this practice is that by the failure of both the 'just war'-tradition and the 'war as institution of law'-tradition to provide a meta-criterion to overcome fundamental disagreement on what use of force is and is not just or instead aggression, agreement is sought in proceduralization through the creation of the UN, and the substantive decision is delegated to the Security Council. However, as discussions in this collective security paradigm however show, substantive agreement is not reached either. Disagreement on what aggression is was merely translated into a new vocabulary, forming new arguments based on old reasoning and the same old assumptions, produced by what the new procedural framework recognizes and dismisses as relevant. Openness and discipline thus return and interact throughout this practice. Interestingly, a similar dynamic is seen in the process of the regulation and criminalization of the notion of aggression, which is the topic of the next chapter. Substantive disagreement on what aggression is and is not over and over recurred, which led to an effort to find agreement on procedural rules to delegate the substantive decision elsewhere. Yet, such procedural rules do not solve the substantive contestation by itself, nor do they provide a meta-criterion on which basis to do so. Instead, it creates a new playing field, with new rules, which moves the

contestation into new languages, new arguments, on the basis of assumptions that are as varied and contradictory as they ever were, but providing insight into understanding that the deep structure of international law remains as indeterminate as it ever was.

4. CONSTRUCTING THE CRIME OF AGGRESSION

The United Nations was created in the aftermath of the Second World War, and prior to the Nuremberg and Tokyo prosecutions. Its primary purpose was 'to maintain international peace and security; and to that end to take effective collective measures for the prevention and removal of threats to the peace and the suppression of acts of aggression or other breaches of the peace (…).'[236] Aggression was thereby placed at the center of the task of the UN. At the founding San Francisco Conference, the United Nations Charter was debated and eventually created. The definition of aggression, and whether it should be included in the UN Charter, caused much contention.[237] Those opposing the inclusion of a *definition* of aggression were in the majority, led by the United States and Great Britain. After protracted discussion, any definition of aggression was omitted from the UN Charter and it was decided to 'leave to the [Security] Council the entire decision as to what constitutes a threat to the peace, a breach of the peace, or an act of aggression.'[238] With this conclusion, the UN Charter was born, as well as the discussion that prolongs to date on where the distinguishing line lies between illegal but not aggressive use of force on the one hand and aggressive use of force on the other. The arrival at the conclusion that what 'aggression' exactly is in more specific terms was deeply disagreed on and a subsequent decision that delegates this substantive decision elsewhere, is a dynamic that was repeated throughout the following decades of regulating and criminalizing aggression, which is what this chapter discusses.

Because of its disruptive effects on international peace and stability, aggression is often regarded as an international crime of great gravity. In its judgment that convicted several of the Nazi leaders for their role in committing aggressive war throughout Europe, the Nuremberg Tribunal considered that initiating a war of aggression is 'the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.'[239] When 50 years later a permanent international criminal court was created, intended to address 'the most serious crimes of concern to the international community as a whole,'[240] it was thought by many that the crime of aggression should be part of that institution's jurisdiction, and that the ICC would not be whole without it.

Creating a criminal law provision from the notion of aggressive war has, however, not been an easy task. As is seen in 'use of force'-discourse, the distinction between

[236] The Dumbarton Oaks Proposals for a General International Organization, Ch. I, Article 1.
[237] Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 1* (Oceana Publications Inc., 1975), at 39.
[238] Report of Mr. Paul-Bonceur, Rapporteur, on Chapter VIII, Section B, published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 1* (Oceana Publications Inc., 1975), at 349-361.
[239] International Military Tribunal, *United States of America et al. v. Goering et al.*, Judgment (1946), 41 *Am J. Int'l L.* (1947) 172, p. 186.
[240] Preamble Rome Statute.

aggressive use of force and non-aggressive use of force is a complex and tricky one, causing significant disagreement on the substantive meaning of 'aggression' and on how to operationalize this crime of aggression within the framework of the ICC. Nevertheless, during the 2010 ICC Review Conference in Kampala, consensus was found on the crime of aggression amendment, providing the ICC Statute with a definition and a jurisdictional scheme to prosecute individuals for committing aggression.

The discussions in the run-up to the creation of the United Nations and during the subsequent process of regulating and criminalizing aggression through a number of working groups demonstrated that 'aggression' was not regarded to be the equivalent of 'illegal use of force' but a narrower category. All aggression is illegal use of force, but not all illegal use of force is also regarded as aggression. To distinguish which uses of force qualify as aggression and which not and to specify the term 'aggression' that was included in Chapter VII of the UN Charter, shortly after the creation of the UN, a number of special working groups and commissions were mandated to define this distinction. The idea was that with a more specific definition, the Security Council as well as international relations outside of the UN institutionalized context would benefit from knowing what force was allowed to resort to and what was aggressive.

After decades of protracted and fundamental disagreement, in 1974, the General Assembly adopted with consensus a definition of aggression.[241] This chapter shows that this agreement, however, did not include or reflect substantive agreement on distinguishing aggression from non-aggression in concrete cases where disagreement continues to be fundamental, but entailed agreement to the extent that wasn't barred by this disagreement and agreement on a procedural arrangement to leave the eventual decision in contentious situations to the Security Council.

The subsequent years of negotiating towards the 2010 ICC crime of aggression amendment repeated much of the same debates; discussing many of the same disagreements. Nevertheless, on 11 June 2010, delegations from the member states of the ICC came to a consensus agreement on the definition of the crime of aggression and a jurisdictional regime.[242] This outcome of the 2-week long Review Conference of the Rome Statute, taking place in Kampala, Uganda, was unexpected for most followers prior to the conference,[243] and was celebrated widely as a historic achievement.[244] The inclusion of the crime of aggression in the Rome Statute was

[241] *Definition of Aggression*, UNGA Res 3314 (XXIX) (14 December 1974)
[242] Assembly of States Parties to the International Criminal Court, Resolution RC-Res.6 (adopted 11 June 2010).
[243] See also Christian Wenaweser, 'Reaching the Kampala Compromise on Aggression: The Chair's Perspective' (2010) 23 *Leiden Journal of International Law* 883.
[244] See Stefan Barriga, 'Negotiating the Amendments on the Crime of Aggression', in Kress (ed.), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), 3-57, at 3-57; Christian Wenaweser, 'Reaching the Kampala Compromise on Aggression: The Chair's Perspective' (2010) 23 *Leiden Journal of International Law* 883, at 883-887; Niels Blokker & Claus Kress, 'A

seen as the capstone of a century-long process to prohibit and criminalize aggressive war; use of force that is not legal and not legitimate, but instead an aggressive resort to armed forces, persistently threatening peaceful inter-communal relations even since mankind started to live in considerable communities. The reason for this celebratory atmosphere was that what had been worked towards but not yet fully achieved at Versailles, in the interwar period with bilateral and multilateral treaties, in San Francisco in 1945 when the United Nations was created, in the special working groups in the 1950s, 1960s and 1970s, in the International Law Commission in the 1990s, or in Rome in 1998 when the ICC was created, was finally on the verge of culmination.[245] The crime of aggression would enter into force in 2017 or soon thereafter, and with the crime of aggression, the world not only renounced aggressive war as an instrument of national policy, but agreed that it is a crime, for which individuals can be prosecuted. Moreover, it provided the norm with a hierarchically superior status by virtue of being part of the jurisdiction of the ICC, whose statute denounces it as one of 'the most serious crimes of concern to the international community as a whole.'[246] In short, the enthusiasm in Kampala celebrated progress. With the crime of aggression, the world had come together to take a collective stand against those considering aggressive war. Yet, as this chapter discusses, upon closer examination of the actual provisions, agreement is reached mostly on procedural aspects, and the core decision on what, exactly, entails a criminally aggressive use of force vis-à-vis a non-aggressive use of force is left open, to be delegated elsewhere: to the discursive space of deliberation among stakeholders, practitioners, academia, and other publicists and advocates, and eventually to the judges' table, at the ICC.

The regulation of war reflects the end of the idea that war is a right for states – to advance objectives and interests – which turned into a prohibition and a crime. Within a century, the legalization and constitutionalization of the norm governing the use of force thus went from the idea of resort to force as belonging to the realm of a state's policy to decide over to a prohibition of aggressive war after WWI, a 'prohibition to use aggressive force' when WWII demonstrated that the post-WWI

Consensus Agreement on the Crime of Aggression: Impressions from Kampala' (2010) 23 *Leiden Journal of International Law* 889-895 ('historic achievement'); Claus Kress & Leonie von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 *Journal of International Criminal Justice* 1179-1217 ('exceeds expectations one could have'); David Scheffer, 'States Parties Approve New Crimes for International Criminal Court' (2010) 14 *ASIL Insights* ('historic milestone'); Hans-Peter Kaul, 'From Nuremberg to Kampala - Reflections on the Crime of Aggression' (2011) 43 *Stud. Transnat'l Legal Pol'y* 59-84 ('a giant step forward'); Astrid Reisinger Coracini, 'The International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression – at Last… in Reach… over Some' 2 *Goettingen Journal of International Law* 745-789 ('important step for international criminal justice'; 'success'); Jennifer Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference' (2011) 11 *International Criminal Law Review* 49-104 ('historic'; 'solid achievement').

[245] 'On the verge' because the Kampala amendment provides that the exercise of jurisdiction is pending a decision to be taken by a majority of the states parties after 1 January 2017 (Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) U.N. Doc. A/CONF.183/9 (Rome Statute), available at http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf, art. 15*bis*(3) and 15*ter*(3)).

[246] Preamble, Rome Statute.

'prohibition to war' did not suffice,[247] post-WWII criminal tribunals that prosecuted individuals for the crime of aggression referred to as 'the supreme international crime,'[248] failed attempts to create state criminality for aggression through the International Law Commission, the inclusion of the crime of aggression under the Rome Statute as one of the four international crimes over which the ICC would exercise jurisdiction,[249] to consensus in Kampala over a definition and jurisdictional regime for the crime of aggression at the ICC.[250] Acts formerly belonging to the realm of politics developed into a conventional prohibition,[251] then a customary prohibition,[252] attained a hierarchical superiority in law when it became widely recognized as *erga omnes* violation and *jus cogens* norm, and eventually were granted ultimate superiority when aggression became recognized as one of the four international crimes over which the ICC would have jurisdiction, alongside genocide, crimes against humanity and war crimes. These are crimes that the preamble of the Rome Statute describes as 'the most serious crimes of concern to the international community as a whole.'[253]

The definition of the crime of aggression that was eventually agreed upon during the 2010 Review Conference of the ICC provides that an act of aggression means the use of armed force of one state against the sovereignty, territorial integrity or political independence of another.[254] A *crime* of aggression entails 'the planning, preparation, initiation or execution (…) of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.'[255] Thus, despite being illegal, an illegal use of force is not a crime of aggression unless it is also a *manifest* violation of the UN Charter.

This chapter describes the coming into existence of this crime of aggression amendment and its provisions. It shows how in this process, agreement was found in the procedural arrangement to leave it up to the Security Council and International Criminal Court respectively to sort out what neither in the 1974 resolution nor the 2010 Kampala amendment could be achieved: substantive agreement on how to distinguish between aggressive and non-aggressive use of force in situations where fundamental disagreement exists on a particular use of force. Notwithstanding the

[247] Article 2(4) UN Charter.
[248] International Military Tribunal, *United States of America et al. v. Goering et al.*, Judgment (1946), 41 *Am J. Int'l L.* (1947) 172, at 186.
[249] Due to disagreement on the definition and jurisdictional regime, the crime of aggression existed as one of the crimes in Article 5 of the Rome Statute but was initially left without jurisdiction until further agreement would be reached.
[250] Articles 8*bis*, 15*bis* and 15*ter* Rome Statute.
[251] *Treaty of Mutual Guarantee* between Belgium, France, Germany, Italy and the United Kingdom and six other bilateral treaties concluded at Locarno on 16 October 1925; Kellogg Briand Pact (*General Treaty for Renunciation of War as an Instrument of National Policy* (1928)); Article 2(4) UN Charter.
[252] See for instance International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, I.C.J. Reports (1984) 70.
[253] Preamble, Rome Statute.
[254] Article 8*bis*(2) Rome Statute, which is an exact copy of the definition of aggression provided in *Definition of Aggression*, UNGA Res 3314 (XXIX) (14 December 1974).
[255] Article 8*bis*(1) Rome Statute.

occasional occurrence of rather clear instances of aggression, such as the Nazi invasions throughout Europe or Saddam Hussein's invasion into Kuwait (which in itself wasn't even condemned in the Security Council as aggression, only Iraq's actions against foreign diplomatic premises and personnel was), there are many other examples that show that the debate on when to use force and when not, and where to draw the line between aggressive use of force and non-aggressive use of force continues to date.

Nevertheless, a legal approach was chosen to try and address the problems associated with aggressive war, with the logic that bringing the problem of aggressive war to the realm of law would make addressing this problem more tangible and would limit states in their abilities to use aggressive force. However, as the process of regulating and criminalizing aggression shows, consensus could only be reached on legal provisions that were broad and open enough to allow fundamental disagreement on what aggression is to maintain. It thereby shows that this turn to law in pursuit of (the ideology of) legalism to suppress the politics of the question of the legitimacy of war therefore does not suppress politics. The chapter describes how in the turn to law to escape the politics of the aggression determination, the way to reach agreement that was observed in the efforts to regulate and criminalize aggression was to go back to the abstract, where agreement existed on the undesirability of aggressive war. Whereas the *process* of regulating and criminalizing aggression can be seen in terms of this turn to law and legalism, the *product* of it, leaving this decision ultimately to the Security Council in the1974 definition of aggression or by relying on an assessment of the legitimacy of war in the 2010 crime of aggression amendment to the ICC Statute, rather reflects a turn away from legalism. In other words, the politics of suppressing politics through legalism thereby inevitably needs to turn away from legalism to invite politics, this time through the language of law.

Moreover, by describing the process of regulating and criminalizing aggression, this chapter demonstrates how translating the issue of aggressive war into the legal language and thus understanding the question of the legitimacy of war in legal terms brings in law's disciplining force. First, it includes certain arguments as being recognized as justificatory for war when they are constructed in legal terms and invoke legal sources and/or precedent. For example, Putin's annexation policy in Georgia were buttressed by arguments that invoked, for example, the NATO precedent and the responsibility to protect compatriots, after having given formerly foreigners Russian passports, and thus bringing them under Russia's diplomatic protection, and this gave a measure of legal credence to the annexations. Second, it excludes certain arguments from being recognized as justificatory for war. For example, arguments that force is resorted to in pursuit of *Grossraum* or *Lebensraum* or to install a more favorable government to one's interests can no longer count on being regarded as justifications for use of force against another state the current international law on use of force. Law thereby distinguishes between use of force that is deemed legal (for instance self-defense upon being subjected to an armed attack)

and use of force that is deemed illegal (for instance for expansion of territory). Third, law's disciplining force excludes a-legal arguments from being considered whatsoever. Using force because 'one would feel like it,' for example, misses any connection with the legal language and is therefore not recognized as possible argument for resorting to force. On the other hand, however, this chapter shows how in the efforts to reach substantive agreement on what exactly entails aggression, or, in other words, what use of force is deemed desirable and lawful or at least justified vis-à-vis undesirable and aggressive, the reality of seemingly unbridgeable differences unceasingly re-emerges.

The idea of the law on aggression as a mediating power between opposing claims appears thereby unattainable: the process of regulating and criminalizing aggression tells a story that, over and over again, there is no agreement found on where to draw the line between aggression and non-aggression, even though there is agreement on its undesirability and one or two historic situations. The project of regulating and criminalizing aggression thereby illustrates the false dichotomy of the two logics of 'law's power to trump politics' and 'speaking reality to lawyers' to show instead a more complex picture in which law generates power to discipline discourse but at the same time is limited where disagreement remains fundamental. It illustrates how this then leads to a detouring towards what can be agreed on, away from the substantive particularities, back to the abstractness of generalities, where all can agree on the undesirability of 'aggression' as such. It also illustrates how this detour gets practical consequence in agreeing on procedures and on institutionalization, which delegates the further development of the norm elsewhere, away from the diplomats' table, towards the decentralized and open discursive field where (re)construction and (re)constitution of norms take place.

4.1 Prosecuting Crimes Against Peace in Nuremberg and Tokyo

After the First World War, the Allied Powers tried to prosecute Kaiser Wilhelm II for his role in committing an aggressive war. Article 227 of the Versailles Treaty provided that

> The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.
>
> A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.

> In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.
>
> The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.[256]

However, Wilhelm II had fled to the Netherlands that refused to extradite him. The prosecution that would have been based on the mystified criminal accusation of having committed 'the supreme offense against international morality and sanctity of treaties,' therefore never took place.

During the *Interbellum*, a number of treaties were signed between various powers that provided that aggression was prohibited by international law[257] and the United Nations Charter prohibited use of force and provided that aggression would be suppressed by all nations together. After the Second World War, Tribunals were created in Nuremberg and Tokyo to prosecute German and Japanese leaders for their crimes against the peace, which is how the crime of aggression was phrased then.

4.1.1 The London Conference and the Nuremberg Charter

After the Second World War, the victorious states, the United States, Great Britain, France and the Soviet Union, agreed to set up the International Military Tribunal at Nuremberg that would charge Nazi leaders with aggression, then called 'crimes against peace,' as a criminal act.[258] They came together in what is now known as the London Conference, taking place from June to August 1945, where they agreed on setting up the Nuremberg Tribunal, and drafted its Charter. They would subsequently also create the Tokyo Tribunal, prosecuting Japanese leaders for the same crimes. Together, these four states decided what should be included in the Nuremberg and Tokyo Charters. The proposal to charge a war of aggression as a crime was based on the argument that international instruments, such as the Geneva Protocol of 1924, the 1927 League of Nations Resolution on Aggression, and the Kellogg-Briand Pact, showed that international law had the goal 'to make war less attractive to those who

[256] Article 227 Treaty of Versailles.
[257] Including the 1899 and 1907 Hague Conventions, the Versailles Treaty, the 1925 Pact of Locarno, the 1928 Kellogg-Briand Treaty and various bilateral Non-Aggression Agreements.
[258] American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945, published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 1* (Oceana Publications Inc., 1975), at 362-367.

have governments and the destinies of people in their power.'[259] From these treaties it could be derived, the majority argued, that war was a violation of international law, at least for states that had signed the treaties, and that it was a crime. France, represented by Professor André Gros, did not believe that launching a war of aggression could be considered a crime since there had never before been any sanctions connected with such an offense,[260] and they opposed such an expansive role for international law. They realized that the Nuremberg Charter would stand as a landmark and would be examined by many critics for many years.[261] They wanted to avoid criticisms that individuals were punished for acts that were not actually criminal under international law. Since the French were opposed to the idea that aggression was a crime at the time the acts were committed, their proposal for the formulation of the crimes section in the Charter did not use the word 'criminal' or 'crime' but suggested that the Tribunal would have jurisdiction over those who directed the preparation and conduct of 'the policy of aggression (…) in breach of treaties and in violation of international law.'[262] However, the majority disagreed and pointed to the Kellogg-Briand Pact to claim the existence of the norm that criminalized aggression.

Justice Röling would later criticize this severely in his dissenting opinion in the Tokyo judgment and in subsequent writings. He submitted that, instead, the Kellogg-Briand Pact was an expression of a growing aversion against war, and a desire to appeal to public opinion. Röling pointed to Briand who described the treaty poetically as 'l'éveil d'une grande espérance'[263] and, as was submitted less poetically in the American Senate, 'nothing more than an international kiss,' and, even less poetically in that same Senate, 'a useless but perfectly harmless peace-treaty.' 'Useless' because it did not include any sanctions, 'harmless' because Kellogg and Briand themselves expressly swore that never a violation of this treaty could be brought before any international tribunal.'[264]

The London Conference majority, however, disagreed and got their way. Aggression was included in the Nuremberg Charter as 'crimes against peace.' To argue for this position, both arguments that international law is based on consent *and* that it is *not* based on consent were invoked by the British, Americans and Russians (the French were opposed). On the one hand, the existence of the *crime* of aggression norm was

[259] Report to the President by Mr. Justice Jackson, June 6, 1945, published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 1* (Oceana Publications Inc., 1975), at 368-371.
[260] XXXVII. Minutes of Conference Session of July 19, 1945, p. 295, published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 1* (Oceana Publications Inc., 1975), at 382.
[261] Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 1* (Oceana Publications Inc., 1975), at 382.
[262] XXXV. Draft Article on Definition of "Crimes", Submitted by French Delegation, July 19, 1945, p. 293, published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 1* (Oceana Publications Inc., 1975), at 380.
[263] This translates into 'the awakening of a great hope,' cited in B.V.A. Röling, *Strafbaarheid Van De Agressieve Oorlog* (Wolters, 1950), at 17.
[264] B.V.A. Röling, *Strafbaarheid Van De Agressieve Oorlog* (Wolters, 1950), at 17.

said to be agreed on and provided by treaties,[265] expressing state consent to be bound by such a criminal norm. Since this was rather difficult to uphold because none of the treaties on the matter even hinted at a jurisdiction over a crime of aggression and thus criminal prosecutions of individuals, responses to this argument relied on non-consensual argumentation: the British, Americans and Russians relied on naturalistic and normative arguments, such as that international law at that time *should* give form to the wide *conviction* and dominant *morality* that war is a crime. Paradoxically, they thereby thus relied both on the argument that aggression was a crime because an expression of state will through treaties and thus binding international law, as well as rejecting the idea that the binding nature of international law derives from state will by relying on the naturalist conception that it is a crime because it is in accordance with a shared morality and conviction, rather than being derived from actual state will to consent.[266]

At the London Conference, the Charter of the Nuremberg Tribunal was eventually adopted by the four victorious states. It was adhered to by 19 nations and subsequently received the approval of the UN General Assembly. This Charter formed the basis of the criminal indictments of the leaders of the Nazi regime who were charged with personal responsibility for aggressive war. However, nowhere in the eventual Charter was aggression further defined. The French and Russians were against defining aggression in the Charter, whereas the representatives of the United States and United Kingdom found it essential.

Sir David Maxwell Fyfe of Great Britain expressed his concern that not having a definition of aggression would open the door for trouble because defenses such as anticipated self-defense, for instance for the invasion of Norway, could then be argued.[267] Justice Robert Jackson of the United States argued that it was necessary to include a definition of aggression and a precise specification of the elements of the crime that would be charged in the Charter.[268] He stated that if a man is charged with making aggressive war, an American judge would think that he should be allowed to show that the war concerned was not aggressive.[269] The lack of a definition would allow for such a successful defense strategy, he claimed. The United States proposed a definition that was based on several existing treaties on the topic, including the Soviet

[265] Including the 1899 and 1907 Hague Conventions, the Versailles Treaty, the 1925 Pact of Locarno, the 1928 Kellogg-Briand Treaty and a number of bilateral Non-Aggression Agreements.
[266] This is an illustration of the dynamic that Martti Koskenniemi demonstrates to lie in the deep structure of the international legal argument and emerges throughout the field of international law. For an elaborate study on the combination of such seemingly mutually exclusive arguments in international legal argumentative structures, see Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, 2005).
[267] XXXVII. Minutes of Conference Session of July 19, 1945, p. 300, published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 1* (Oceana Publications Inc., 1975), at 390.
[268] Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 1* (Oceana Publications Inc., 1975), at 387.
[269] Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 1* (Oceana Publications Inc., 1975), at 392.

treaty of 1933.[270] General Nikitchenko of the Soviet Supreme Court, however, did not want the Tribunal to come up with a definition of aggression at all. Taking a realist position, his primary concern was to punish the Nazi criminals and not to make international law for the future, which may turn out to be opposed to the USSR's national interest. Moreover, Nikitchenko argued that if the delegates that discussed the issue of aggression at the creation of the United Nations Charter had been unable to define aggression, those drafting the Nuremberg Charter should not do it either. If the drafters of the Nuremberg Charter would formulate a definition, he argued, it would set the door open for arguments of inconsistent interpretations on what was or was not a crime under international law.[271] The Soviet delegation therefore supported the French proposal that did not include a definition.

Eventually, the parties to the London Conference could not agree on whether or not to include a definition of aggression. They compromised in the end that no definition of aggression was included, but that the judges would be referred to the treaties on aggression that did exist.[272] Article 6(a) of the Nuremberg Charter defined 'Crimes against Peace', the term that was agreed upon by the parties to be a better phrase than aggression. The relevant provision reads as follows:

> The Tribunal (…) shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes:
> - "The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
> "(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;[273]

In his Opening Statement that started the trial against the Nazi leaders, US representative Robert Jackson who by then had become the American Prosecutor criticized and defended the lack of a definition of aggression as grounds for a criminal prosecution as follows, being fully aware of the 'insoluble political issues' the crime of aggression (at least outside this Nazi case) brought:

> 'It is perhaps a weakness in this Charter that it fails itself to define a war of aggression. Abstractly, the subject is full of difficulty and all kinds of

[270] Document XXXII in the Conference on Military Trials, published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 1* (Oceana Publications Inc., 1975), at 378-379.
[271] XXXVII. Minutes of Conference Session of July 19, 1945, p. 298, published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 1* (Oceana Publications Inc., 1975), at 385.
[272] Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 1* (Oceana Publications Inc., 1975), at 394-396.
[273] Article 6 of the Charter of the International Military Tribunal, Nuremberg Trial Proceedings Vol. 1, available at http://avalon.law.yale.edu/imt/imtconst.asp, last visited on 9 January 2010.

> troublesome hypothetical cases can be conjured up. It is a subject which, if the defense should be permitted to go afield beyond the very narrow charge in the Indictment, would prolong the Trial and involve the Tribunal in insoluble political issues. But so far as the question can properly be involved in this case, the issue is one of no novelty and is one on which legal opinion has well crystalized.'[274]

4.1.2 The Nuremberg Tribunal

The indictment presented to the Nuremberg Tribunal accused the major Nazi defendants of a common plan or conspiracy to commit crimes against peace, war crimes, and crimes against humanity.[275] Among the offenses that were charged were the 'mobilization for aggressive war' and the 'initiation of aggressive war.' Specific reference was made to violations of the 1899 and 1907 Hague Conventions, the Versailles Treaty, the 1925 Pact of Locarno, the 1928 Kellogg-Briand Treaty and various Non-Aggression Agreements.[276] In this reference it shows that the judges followed the reasoning of the London Conference and likewise combined seemingly mutually exclusive consensual and non-consensual arguments in constructing the legal basis for prosecuting the crime of aggression.

In his opening statement, Justice Robert Jackson, prosecutor for the United States, denounced aggressive war as 'the greatest menace of our times.'[277] And the Tribunal concluded in the beginning of the judgment that

> '[t]he charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.'[278]

The Tribunal did not accept the defense's arguments that at the time the alleged criminal acts were committed, aggressive war was not generally considered a crime,

---

[274] R.H. Jackson (1945), 'Opening Statement before the International Military Tribunal', *The Trial of German Major War Criminals - Proceedings of The International Miliatry Tribunal Sitting at Nuremberg*, London, p. 81.
[275] Official Records of the Nuremberg Trials (The Blue series) in 42 volumes, Volume I, *Indictment*, available at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html, p. 28.
[276] Official Records of the Nuremberg Trials (The Blue series) in 42 volumes, Volume I, *Indictment*, available at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html, at p. 84-92.
[277] Robert Jackson, *Opening Address for the United States*, published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 1* (Oceana Publications Inc., 1975), at 437.
[278] International Military Tribunal, *United States of America et al. v. Goering et al.*, Judgment (1946), 41 *Am J. Int'l L.* (1947) 172, p. 186.

that no statute had defined aggressive war, that no penalty had ever been fixed for its commission, and that no prior court had ever been established to try the offense. In response to these *nullum crimen sine lege* arguments of the defense, the Tribunal declared that it found that the Charter was an expression of international law existing at the time of its creation and not, as the defendants had argued, an arbitrary exercise of power on the part of the victorious nations.[279] The Charter provided that it is a crime to plan or wage a war of aggression or a war in violation of international treaties.[280] The Tribunal asserted that, given their positions in the Government of Germany, the defendants must have known that they were acting in defiance of international law, when 'in complete deliberation they carried out their designs of invasion and aggression.'[281] The Tribunal particularly pointed to those defendants that must have known of the treaties signed by Germany, outlawing the recourse to war for the settlement of international disputes.[282] These treaties that they must have known about according to the Tribunal included the Kellogg-Briand Pact, that was binding on 63 nations, including Germany, Italy, and Japan at the outbreak of war in 1939,[283] the Treaties of Mutual Guarantee, Arbitration, and Non-aggression (for instance the treaty of Locarno in 1925), the Versailles Treaty, and the 1907 Hague Convention. The Tribunal emphasized that the nations who signed the Kellogg-Briand Pact unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it.[284] In the opinion of the Tribunal, this 'renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law.'[285] The Tribunal argued that consequently 'those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.'[286]

This argument comes back to the shift around the First World War, from a view in which war was seen as a right and legitimate form of pursuing national interests, towards the view that war is forbidden and a crime. This latter, and more moralistic way of regarding war, was rejected by others. For instance Hans Morgenthau, adopting a realist 'power trumps law'-logic, maintained that criminalizing aggression would be a rather ineffectual guide to foreign policy. Instead, he argued, moralism was even harmful since it would provide ideological justification for a limitless

[279] Official Records of the Nuremberg Trials (The Blue series) in 42 volumes, Volume I, *Judgment*, available at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html, at p. 218.
[280] Article 6(a) of the Charter of the International Military Tribunal, Nuremberg Trial Proceedings Vol. 1, available at http://avalon.law.yale.edu/imt/imtconst.asp, last visited on 9 January 2010.
[281] Official Records of the Nuremberg Trials (The Blue series) in 42 volumes, Volume I, *Judgment*, available at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html, p. 219.
[282] Official Records of the Nuremberg Trials (The Blue series) in 42 volumes, Volume I, *Judgment*, available at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html, at p. 219.
[283] Official Records of the Nuremberg Trials (The Blue series) in 42 volumes, Volume I, *Judgment*, available at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html, p. 219.
[284] Official Records of the Nuremberg Trials (The Blue series) in 42 volumes, Volume I, *Judgment*, available at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html, at p. 220.
[285] Official Records of the Nuremberg Trials (The Blue series) in 42 volumes, Volume I, *Judgment*, available at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html, at p. 220.
[286] Official Records of the Nuremberg Trials (The Blue series) in 42 volumes, Volume I, *Judgment*, available at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html, at p. 220.

crusading politics and wars.[287] He thereby pointed to the absence of agreement on which and whose morality would be upheld when views differ, and the openness and vagueness of legal provisions when such disagreement is legalized.

On the defense's argument that the Kellogg-Briand Pact did not expressly criminalize aggressive wars and did not set up courts to try violators of the treaty, the Tribunal relied on comparison with the 1907 Hague Convention. Violations of its prohibition to resort to *certain methods of waging war*, the *ius in bello* thus rather than *ius ad bellum*, had been enforced in military tribunals for many years, even though the Hague Convention nowhere designated such practices as criminal, prescribed any sentences, nor mentioned a court to enforce its rules. In the opinion of the Nuremberg Tribunal, waging aggressive war was 'equally illegal' as war crimes.[288] In addition, the Tribunal relied on customary international law for which it referred to several treaties in which wars of aggression are referred to as international crimes, although without any specification as to providing a legal basis for prosecuting individuals for such crimes.[289] Implicitly, the Tribunal chose to interpret the Kellogg-Briand Pact in such a way that the Pact showed a continued effort for international cooperation to prevent aggression. By drawing this inference from the Hague Conventions to Kellogg-Briand, the Tribunal argued that criminalization of aggression had obtained the required *opinio iuris*, and that the state practice could be derived from the *development* in the treaties prohibiting aggression. Here, the Tribunal adopted a normative approach by bringing in arguments of shared morality and the law's power to induce conforming behavior regardless of the state's subjective will, interest or power.[290] On the other hand, effort is taken to support these non-consensual normative arguments by claiming that it is based on concrete and consensual treaty law, agreements between states, that represent the states' wills, interests and powers. The apparently mutually exclusive positions of normativity and concreteness, and non-consensualness and consensualness, are presented as and appear inseparable. For if this argument were made without referral to treaty law or to another legal basis at all, the opinion had surely been regarded as non-legal, arbitrary and utopian, a judgment that had decided on moral and subjective criteria without any basis in the law. It would be seen as political rhetoric. The ruling would be regarded as violating other shared norms, such as that of legal certainty and *nullum crimen sine lege*. Therefore, a normative approach that desires to criminalize acts that had not been expressly criminalized and agreed upon by states before, requires a reasoning in which the consent of states at least *appears*, if not also exists. In order to prevent the

[287] Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), at 438, citing Hans Morgenthau, *In Defense of the National Interest. A Critical Examination of American Foreign Policy* (Knopf, 1951).
[288] Official Records of the Nuremberg Trials (The Blue series) in 42 volumes, Volume I, *Judgment*, available at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html, p. 220-221.
[289] Official Records of the Nuremberg Trials (The Blue series) in 42 volumes, Volume I, *Judgment*, available at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html, at p. 221-222.
[290] See for a thorough discussion on the contradictory nature of customary law, Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, 2005), at 389-394.

accusation of not applying law, the Tribunal thus adopted an argumentative structure that combined mutually exclusive reasoning to make the appearance of staying away from, using Koskenniemi's words, apology and utopia.

On the one hand, the reading of the binding nature of the international law on aggression invokes utopian and non-consensual arguments by identifying the norm as naturalistic and peremptory. On the other hand, the Prosecutor and Tribunal find that the fact that Germany had signed, and thus consented to the treaty agreements on aggression was fundamental in finding the legal basis for prosecuting crimes against peace. They went even more explicit: as to the guilt of individuals, the Tribunal examined whether a particular individual must have known that Germany had signed these agreements, and thus had knowledge of the international legal obligations that Germany had committed itself to through these treaties. The identification of aggression as a *moral* wrong and the binding nature of international law as derived from natural law is thus buttressed by using arguments of a concrete character that presuppose that the binding nature of international law is derived from state will. However, the conceptual basis of these types of arguments appear mutually exclusive. Either international law is binding because it expresses state will and explicit consent. If this is lacking, states are not bound by international law. Or, the binding nature of international law is derived from something 'higher' than state will, that binds states on the basis that international legal norms are binding by reflecting natural and shared values and morality. Even though they appear mutually exclusive, neither can be upheld without the other. One the one hand, the idea that the binding nature of international law is absolutely reliant on state will is problematic because what a state wills can change, and law would be no law if it moves as arbitrary as 'will' may. There would be nothing left of law than pure state will. On the other hand, however, the invocation of a 'higher' notion of justice to ground the bindingness of law to a less changeable situation than state will is also problematic. The idea that international law is derived from natural law and morality instead of state will arrives at the dilemma of the impossibility of knowing the content of what 'justice' is independently to what states 'will.'[291] International law is thus explained by referring to state will as expressing justice and by referring to justice as expressing what states will/consent to. To avoid criticism of being apologetic (only reflecting consent and thus state will) or utopian (referring to an inherently political concept like 'justice'), international legal argument therefore moves position between the two, thereby remaining open-ended.[292] By combining references to treaty and state consent on the one hand and to a shared and emerging morality that should be used to (re)interpret those treaties' lack of reference to criminality on the other, the Nuremberg Tribunal's argumentation on the legal nature of the crime of aggression illustrates this dynamic that Koskenniemi

[291] Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, 2005), at 386.
[292]Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, 2005), at 387.

described, and demonstrates the lack of clarity on the norm's substance as well as the urge to present argumentation in the legal language.

This also revisits the same dilemma that the two 'use-of-force'-traditions that were discussed in the previous chapters were trapped in. Where the 'war as institution of law'-tradition couldn't restrain war because it could not reach a legal distinction between lawful use of force and aggression beyond particular state wills, unable to bar force legally when a state willed it so, the 'just war'-tradition sought an answer to this dilemma in an objective and universal (non-consensual) notion of justice which led to an irresolvable dispute on its correct interpretation.

Having thus dealt with the question of the legal grounds for the crime of aggression as a criminal norm, they moved to how these provisions enabled the prosecutions of individuals for what was argued to be the attributable to states rather than individuals. In response to the defense's assertion that international law is concerned with the actions of *states* and not of individuals, the Tribunal stated that '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[293] To make international law applicable to individuals and thus justify the application of international criminal law as derivative of existing international law at the time of the commission of crimes without violating the principle of non-retroactive application of law, the Tribunal thus applied a cosmopolitan view on international relations. By arguing that individuals are subject to international law, the tribunal needed to submit that international law has a larger scope than being applicable only to states, which at that time was the predominant view of the scope of international law. They argued that international law reaches beyond states, who are thus not (absolute) 'gatekeepers' who keep international law away from citizens and decide themselves how to act towards them. The world in which individuals are subjects of international law is a world in which individuals take a separate position *next* to states, a cosmopolitan world. The defense, however, adopted a contrary worldview, in which the world of international affairs is inter-*state* in nature, that the acts in question are acts of a state, that those who carry out these acts are not personally responsible for them, but are protected by the doctrine of the sovereignty of the state.[294] In the opinion of the Tribunal, however, this principle of international law which may provide immunity to the representatives of a state against laws of other states and international law, could not be applied to acts which were condemned as criminal by international law. It thus argued, and ruled, that the laws on immunity were of a lower level and could be trumped in case criminality for aggression was concerned. This tackling of such argumentation had also already been attempted through Article 7 of the Nuremberg Charter, which expressly denied the defendants

[293] Official Records of the Nuremberg Trials (The Blue series) in 42 volumes, Volume I, *Judgment*, available at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html, p. 223.
[294] Official Records of the Nuremberg Trials (The Blue series) in 42 volumes, Volume I, *Judgment*, available at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html, at p. 222.

the possibility to be protected by their status as government officials.[295] Here, it was thus not only decided that they couldn't be protected through immunity deriving from their government position, but also that they could not shield behind the idea that they were acting in the capacity of state official rather than individual; that they acted in pursuit of state goals rather than as individual and could thus not be punished as individual. Responding to claims that defendants could not be held responsible because they were acting under the orders of Hitler, the Tribunal, while referring to Article 8 of the Charter, which provides that superior orders do not free individuals from responsibility,[296] concluded that '[t]he true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.'[297] Here again, moralism, non-consensualism, naturalism, and universalism is invoked to argue against state protection of the individual under international law, who, it is argued by the Tribunal, in committing crimes under international law, has become a subject of international law himself.

The Nuremberg Tribunal ruled that the invasion of Austria, on 12 March 1938, was a pre-meditated aggressive step in furthering the plan to wage aggressive wars against other countries. According to the Tribunal, this was the first step in the seizure of *'Lebensraum;'* many new divisions of trained fighting men had been acquired; and with the seizure of foreign exchange reserves, the re-armament program had been greatly strengthened.[298] The Tribunal considered that the invasions of Czechoslovakia, Poland, Norway, Denmark, Belgium, the Netherlands, Luxemburg, Yugoslavia, Greece, and the Union of Soviet Socialist Republics were all part of carefully prepared schemes.[299] In this major trial against the Nazi leadership, eight defendants were found guilty for committing Crimes against Peace.[300] The Tribunal concluded that these convicted German leaders had been responsible for premeditated and unprovoked attacks and invasions of peaceful neighboring states, and that by the use of armed force in violation of accepted international obligations, they were, by any permissible standard, guilty of a Crime against Peace. Nowhere, however, did the Nuremberg Tribunal define what 'aggressive war' was.[301]

---

[295] Article 7 of the Charter: "The official position of Defendants, whether as heads of State, or responsible officials in Government departments, shall not be considered as freeing them from responsibility, or mitigating punishment."
[296] Article 8 of the Charter: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment."
[297] Official Records of the Nuremberg Trials (The Blue series) in 42 volumes, Volume I, *Judgment*, available at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html, p. 224.
[298] Official Records of the Nuremberg Trials (The Blue series) in 42 volumes, Volume I, *Judgment*, available at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html, at p. 192.
[299] Official Records of the Nuremberg Trials (The Blue series) in 42 volumes, Volume I, *Judgment*, available at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html, at p. 194-215.
[300] Göring, Hess, Keitel, Jodl, Von Neurath, Von Ribbentrop, Rosenberg, and Raeder.
[301] Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 1* (Oceana Publications Inc., 1975), at 42.

The Nuremberg Trial had lasted from November 1945 to October 1946. After the Nuremberg Tribunal finished its work, American Prosecutor Robert Jackson wrote to the President of the United States that the work of the Nuremberg Tribunal was inspired by the belief that the law had finally unequivocally classified armed aggression as an international crime instead of a national right.[302]

In the subsequent trials under Control Council Law No. 10, another 52 defendants were charged with Crimes against Peace, of which five individuals were convicted for having committed this crime. In the *Ministries* case, aggression was considered at length and that court went a step further than the original Nuremberg Tribunal.[303] Whereas that original Nuremberg Tribunal had found that the *Anschluss* of Austria in 1938, where Austria was incorporated by Germany, was not as such an act of aggression,[304] the Tribunal that decided on the *Ministries* case argued against that ruling and decided that it was an act of aggression, since it would not be reasonable to assume that the nature of the invasion depended on whether it was met with military resistance or not.[305] Compare here argumentation revolving around Russia's involvement in the Crimea and Eastern Ukraine, where also arguments for or against aggression separate, among others, on the question of whether it is relevant whether Ukraine resisted with military means against Russia's overwhelmingly superior military might. In addition, the *Ministries* case Tribunal considered that the defense of 'military necessity was never available to an aggressor as a defense for invading the rights of a neutral.'[306]

4.1.3 The Tokyo Tribunal

Unlike the Nuremberg Tribunal, the Tokyo Tribunal was not created through an international agreement, but proclaimed by General MacArthur. On 26 July 1945, China, the US and the UK signed the Potsdam agreement in which they demanded Japan's unconditional surrender, warning that if Japan would not surrender, it would face 'prompt and utter destruction,' and announcing that 'stern justice shall be meted out to all war criminals.'[307] On 14 August 1945, six days after the US dropped the second atomic bomb on Nagasaki, Japan surrendered. At the subsequent Moscow

[302] Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 1* (Oceana Publications Inc., 1975), at 43.
[303] Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 1* (Oceana Publications Inc., 1975), at 44.
[304] In the opinion of the original Tribunal, the *Anschluss* had been an 'aggressive step' in furthering the plan to wage aggressive war.
[305] The Ministries Case, Military Tribunal IV, *Judgment*, p. 331, published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 1* (Oceana Publications Inc., 1975), at 515.
[306] The Ministries Case, Military Tribunal IV, *Judgment*, p. 334, published in : Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace* (New York: Oceana Publications Inc., Vol. I, 1975), p. 518.
[307] Potsdam Declaration (26 July 1945).

Conference in December 1945, the Soviet Union, UK and US (with concurrence of China) granted General MacArthur, as Supreme Commander of the Allied Powers, the authority to 'issue all orders for the implementation of the Terms of Surrender, the occupation and control of Japan, and all directives supplementary thereto.'[308] Acting pursuant to this authority, General MacArthur issued a special proclamation in January 1946 that established the Tokyo Tribunal, formally named the International Military Tribunal for the Far East, and its Charter. Like the Nuremberg Tribunal, the Tokyo Tribunal had jurisdiction to try individuals for crimes against peace, war crimes, and crimes against humanity. The Tokyo Tribunal had jurisdiction over a greater period of time than the Nuremberg Tribunal, namely from the 1931 Japanese invasion of Manchuria to Japan's surrender in 1945.

The Tokyo Trials took place from May 1946 to November 1948. The Tribunal opened on 3 May 1946 in the former Imperial Army Officers' School in Tokyo. It would face all the problems the Nuremberg Tribunal faced, and then some.[309] One concerned the justification of the trials as such. Where the Nuremberg Tribunal had heavily relied on the exceptional nature of the Nazi crimes, mostly reflected in the Holocaust and concentration camps, and had therefore justified the trials on the basis of this exceptionalism, requiring special legal remedies, the Japanese policies were, in fact, much less exceptional, or actually rather unexceptional.[310] This is not to suggest that the Japanese leaders and military did not commit grave crimes and atrocities, but they did not amount to a comparable level as the German atrocities, nor were they particularly exceptional in light of what usually occurs in wartime. The exceptional nature of the trials, treading on fundamental criminal law and human rights principles, was therefore less convincingly justified, and compromised their legitimacy.

Like in Nuremberg, the accused were tried and convicted on the basis of largely *ex post facto* laws, on the basis of a Charter that had explicitly removed the standard procedural protections available to defendants in Western states.[311] Article 13 of the Tokyo Charter, for instance, provided that the Tribunal would not be bound by technical rules of evidence but would instead test evidence for its 'probative value,'[312] which would be an unacceptable human rights violation in any modern conception of fair trial. Furthermore, Gerry Simpson submits that only one of the Tokyo judges had any experience in international law (Justice Pal), one of the judges had been a victim of those on trial (Justice Jaranilla), and one had no knowledge of the official language that the trial was conducted in (Justice Zarayanov).[313] The Tribunal is moreover famous for its strongly worded dissenting opinions. Justice Röling dissented and

[308] US Department of State, Office of the Historian, Milestones 1945-1952, available at https://history.state.gov/milestones/1945-1952/nuremberg.
[309] Kirsten Sellars, 'Imperfect Justice at Nuremberg and Tokyo' (2010) 21 *European Journal of International Law* 1085-1102, at 1092.
[310] Kirsten Sellars, 'Imperfect Justice at Nuremberg and Tokyo' (2010) 21 *European Journal of International Law* 1085-1102, at 1092.
[311] Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 115.
[312] Article 13 Tokyo Charter.
[313] Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 115.

submitted that the Japanese were being tried for 'political crimes.' Moreover, in his dissenting opinion, Justice Pal submitted that the distinction between aggressive and defensive wars was of purely 'propagandist relevance.'[314] Pal argued that it was defeat rather than aggression that was criminalized and that aggression was a political act falling outside of the realm of legality.[315] He asserted that the criminalization of aggression was simply a way of freezing the *status quo*, and thus revealing international law as a project for stabilizing and securing existing power distributions within international society.[316]

In general, the Tokyo tribunal has been reviewed critically by most commentators. Neil Boister and Robert Cryer conclude that the prosecuting powers at Tokyo violated the principle of legality and non-retroactivity by prosecuting individuals for crimes against peace[317] and failed to give the accused fair trials.[318] Moreover, they conclude with regard to the Tribunal's strategy to prove personal culpability through a construction of conspiracy that the Tribunal at times displayed a 'cavalier approach to individual liability.'[319] Kirsten Sellars calls the Tokyo Tribunal 'the very blackest of courtroom dramas, with an abundance of somber lessons for jurists as well as for politicians and historians.'[320]

Sellars moreover explains the pressure that the Tokyo Tribunal was under when at the same time the Nuremberg judgment was heavily criticized. When the Tokyo Tribunal commenced, the Nuremberg judgment was already under highly critical scrutiny by commentators on its legal grounds, that mostly focused on crimes against peace. The Nuremberg prosecuting powers were well aware of the contentious nature of the Nuremberg approach and hoped to save the Nuremberg legacy if the Tokyo Tribunal would uphold their judgment. A similar decision in Tokyo would confirm and support the Nuremberg approach, and preserve its legacy. Instead, if the Tokyo Tribunal would decide contrary to 'Nuremberg,' the Nuremberg narrative and legal constructions would be heavily undermined.[321] The judges at Tokyo were thus compelled by a dual obligation to uphold both the Tokyo Charter and the Nuremberg

[314] Radha Binod Pal, *Crimes in International Relations* (University of Calcutta Press, 1955), at 264; Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 15.
[315] Tokyo Tribunal, Dissenting Opinion by Justice Pal.
[316] Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 147.
[317] Neil Boister & Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press, 2008), at 136-137.
[318] Neil Boister & Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press, 2008), at 102.
[319] Neil Boister & Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press, 2008), at 245.
[320] Kirsten Sellars, 'Imperfect Justice at Nuremberg and Tokyo' (2010) 21 *European Journal of International Law* 1085-1102, at 1102.
[321] Kirsten Sellars, 'William Patrick and 'Crimes against Peace' at the Tokyo Tribunal, 1946-48' (2011) 15 *Edinburgh Law Review* 166-196.

Judgment, even though the dissenting opinions of Justices Pal and Röling submitted that the crime of aggression did not exist under the international law of the time.[322]

4.2 Post-WWII Regulation of Aggression

After the Second World War, and alongside the two military tribunals that prosecuted Nazi and Japanese leaders for their role in WWII, the United Nations installed several 'special committees,' but it would take until 1974 for the General Assembly to adopt a definition of aggression. This 1974 definition served as a basis for the further discussions that led to the Kampala compromise: the crime of aggression within the framework of the ICC. The definition of the crime of aggression amendment is to very large extent a copy of this 1974 definition, and the negotiations on the crime of aggression to very large extent repeated along the same lines of discussions and outcomes as those that took place in the 1950s, 60s and 70s, in the run-up to the 1974 definition.

4.2.1 Creating Consensus on a Definition of Aggression

At its first session in 1946, the General Assembly affirmed 'the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.'[323] Subsequently, the Committee on the Codification of International Law, which was directed by the General Assembly to formulate a codification of 'offences against the peace and security of mankind,' recommended the establishment of the International Law Commission to deal with this problem.[324] After this, very little progress was made due to rising tensions between the Soviet Union and its former war time allies. Despite having opposed the inclusion of a definition of aggression during the London Conference for establishing the Nuremberg Tribunal, the Soviet Union now proposed to come to a definition of aggression in order to eliminate justifications for aggressive wars.[325] However, this time, the United States, France and Canada led the protest against any form of a fixed

[322] Kirsten Sellars, 'Imperfect Justice at Nuremberg and Tokyo' (2010) 21 *European Journal of International Law* 1085-1102, at 1097.
[323] General Assembly Resolution 95(1) (December 11, 1946).
[324] General Assembly Document A/504 (November 21, 1947).
[325] General Assembly Document A/C.1/608, Union of Soviet Socialist Republics: Draft resolution on the definition of aggression (November 4, 1950).

definition.[326] They argued that the determination of aggression should be up to the discretion of the Security Council.[327]

Several reports followed, and in 1952, the First Special Committee on the Question of Defining Aggression was established and consisted of 15 members. Its report summarized many of the problems but was unable to reconcile many of the differences.[328] This report was followed by new comments by various governments and resolutions with specific proposals. There was a difference of opinion on whether it was possible or desirable to define aggression and, if so, which form and what content it should have. Some were doubtful that a definition would be progress at all, Argentina and Denmark for instance. Others expressed general support for a definition (France had moved to this camp now), or were in favor of a detailed definition (the USSR).[329] In the absence of any possibility to reach an agreement, a new Special Committee was established. At the same time, there had also been a committee that considered the 'International Criminal Jurisdiction,' in which the establishment of an international criminal court was discussed. The General Assembly decided to defer any consideration of such an international criminal court as well as discussion on the Draft Code of Offences against the Peace and Security of Mankind that the International Law Commission was working on, until the new Special Committee would produce its report.[330] Eventually, these other initiatives were deferred during the whole of the process leading up to the 1974 consensus definition.

This Second Special Committee, consisting of 19 members, produced a report that examined the desirability of a definition, its functions, the kinds of activity covered by a definition, and the various types of definitions. In the meantime, the USSR, supported by the armed forces of its satellite states, had invaded Hungary to suppress a revolt, and the United Nations had not been able to act. War also erupted in the Middle East between Egypt and Israel and around the Suez Canal, and in Vietnam where the United States tried to fight communist forces. By 1957, very little progress had been made.[331] The same differences of opinions existed between those in favor and those opposed to a definition. To some members, the growing international tension required a clear definition of aggression. Others, such as the United States, United Kingdom, Japan, China, and Canada, argued that a definition might make

[326] Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 2.
[327] Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 2.
[328] Report of the Special Committee on the Question of Defining Aggression, Doc. A/AC.66/L.11 (1953), published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 187-201.
[329] Comments received from Governments regarding the report of the Special Committee on the Question of Defining Aggression (A/2638), Document A/2689 and Corr.1 and Add.1, published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 202-213.
[330] General Assembly Resolution 898 (IX) (December 14, 1954).
[331] Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 6.

peace more difficult, since they thought a definition would restrict the discretion that the Security Council and the General Assembly possessed under the UN Charter.[332] Most members wanted to postpone the matter, and the United States proposed that it would be postponed indefinitely.[333]

For several years, the issue was adjourned because there was no change of attitude. The new committee, the Third Special Committee, consisted of 21 members. Even though it had been formed in 1959, it took until 1967 before the committee actually met to attempt defining aggression. Meanwhile, even more tensions had arisen throughout the world, and many accusations of aggression were expressed. The conclusion reached by the Third Committee was to establish yet another committee, the Fourth Special Committee, consisting of 35 members, 'taking into consideration the principle of equitable geographical representation and the necessity that the principal legal systems of the world should be represented.'[334] The Fourth Special Committee started its work in 1968 and would eventually agree on a consensus definition in 1974, that would subsequently be adopted by the General Assembly.[335]

Even though there were many disagreements on many different issues, one of which was the very fundamental discussion on whether there should be a definition at all, the Fourth Special Committee met several times and its members continued their discussion. On 6 July 1968, the Special Committee voted with no votes against and 8 members abstaining for a resolution that the committee would continue its work 'so that it can complete its work by submitting a report containing a generally accepted draft definition of aggression (…).'[336] Many interpreted this like a consensus that it was possible to draft some form of definition of aggression. However, for some years several states continued to express their reservations on the possibility and desirability of defining aggression.

In the 1969 sessions, three proposals for defining aggression were submitted for discussion. The first proposal was from the USSR. It recognized not only direct but

[332] Report of the Sixth Committee, G. A. Doc. A/3756 (1957), published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 248-254.
[333] G.A. Doc. A/C.6/L.402.
[334] UN General Assembly Resolution 2330 (XXII), December 18, 1967.
[335] The Committee was set up by Resolution 2330 (XXII) that provided that the task of the Committee was to submit specific proposals for the definition of aggression, UN General Assembly, Twenty-Third Session, Agenda Item 86, Report of Special Committee, Question of Defining Aggression, A/7185/Rev. 1 (1968), p. 12. The members of this Committee were Algeria, Australia, Bulgaria, Canada, Colombia, Congo (Democratic Republic of), Cyprus, Czechoslovakia, Ecuador, Finland, France, Ghana, Guyana, Haiti, Indonesia, Iran, Iraq, Italy, Japan, Madagascar, Mexico, Norway, Romania, Sierra Leone, Spain, Sudan, Syria, Turkey, Uganda, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, and Yugoslavia.
[336] UN General Assembly, Twenty-Third Session, Agenda Item 86, Report of Special Committee, Question of Defining Aggression, A/7185/Rev. 1 (1968), p. 34-35.

also indirect aggression,[337] i.e. the use of force in such forms as infiltration by armed bands, terrorism, and subversion (as examples of 'indirect aggression') in addition to merely regular armed forces ('direct aggression').[338] As aggressive acts, the Soviet proposal listed the declaration of war, the use of weapons of mass destruction, an attack on the land, sea or air forces or the bombardment of or firing at the territory and population of another state, and an invasion or attack by the armed forces of a state against another state.[339] This draft provided that armed aggression would be an international crime against peace with the political and material responsibility of states and criminal and personal responsibility of individuals.

Some representatives argued that the USSR proposal extended the concept of aggression beyond the scope of the UN Charter, by including acts that did not involve the use of force within the meaning of Article 2(4) of the UN Charter, that is, the use of armed force or physical force, direct or indirect.[340] They argued that since the concept of aggression in the UN Charter only entailed the use of *armed* force and 'an attack on the territorial integrity or political independence of another State,' the definition of aggression should not contain indications that would give the impression that non-armed aggression would be included.[341] It was also argued that it is difficult to find a precise criterion for affirming whether a case of indirect aggression was or was not armed aggression under the terms of Article 1 of the UN Charter.[342] Eventually, in 1970, the USSR deleted the words 'direct or indirect' from its draft proposal,[343] but the eventual resolution did include a provision on indirect aggression. The issue of indirect aggression is further discussed below.

The second proposal was submitted by 13 countries: Colombia, Cyprus, Ecuador, Ghana, Guyana, Haiti, Iran, Madagascar, Mexico, Spain, Uganda, Uruguay, and Yugoslavia. This draft introduced the blockade of the coast or ports as acts of aggression. It, however, specifically excluded acts of indirect aggression, 'subversive and/or terrorist acts by irregular, volunteer or armed bands organized or supported by another State,' as acts against which recourse to self-defense under Article 51 of the

[337] Twenty-Fourth Session, Report of Special Committee, Supp. No. 20, A/7620 (1969), p. 5, published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 326-264.
[338] General Assembly, Report of the Sixth Committee, Document A/7402 (December 13, 1968), para. 16.
[339] Twenty-Fourth Session, Report of Special Committee, Supp. No. 20, A/7620, p. 5 (1969), published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 326-264.
[340] Twenty-Fourth Session, Report of Special Committee, Supp. No. 20, A/7620 (1969), published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 326-264, para. 26.
[341] Twenty-Fourth Session, Report of Special Committee, Supp. No. 20, A/7620 (1969), published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 326-264, para. 26.
[342] Twenty-Fifth Session, Agenda Item 87, Report of the Special Committee on the Question of Defining Aggression, Report of the Sixth Commission, GAOR Doc. A/8171 (1970), para. 18.
[343] Twenty-Fifth Session, Supplement No. 19, Annex I, Draft proposal A (1970).

UN Charter was allowed.[344] It follows that the issue of whether or not to include indirect uses of force was a main bone of contention. Regarding the legal consequences for acts of aggression, this Thirteen Power proposal provided that armed aggression would 'constitute crimes against international peace, giving rise to international responsibility.'[345] Unlike the Soviet proposal, it did not specify what kind of responsibility this would entail or that it would include criminal responsibility for individuals.

The third proposal was submitted by 6 countries: Australia, Canada, Italy, Japan, the United States, and the United Kingdom. This draft included a non-exhaustive list of uses of force that would qualify as acts of aggression. Since all three proposals had included non-exhaustive lists of acts of aggression, it was fairly easily decided that a definition of aggression would also include a non-exhaustive list of acts, although the exact wording would take until 1974. Unlike the other proposals, this Six Power proposal included the role of aggressive intent by listing five possible intentions for the use of force, such as the diminishing or altering of the territory of another State, the interference with the conduct of the affairs of another State, and to inflict harm or obtain concessions of any sort. According to this proposal, the means that are used, such as invasion or bombardment, only qualify as acts of aggression if it is accompanied by the intent to do so. This element, that was not included in the other proposals, provides for the possibility to justify prohibited use of force. Like the Soviet proposal, this Six Power proposal also included indirect uses of force. It suggested that 'the organizing, supporting or directing of irregular forces, acts of terrorism or subversive activities' would be included as acts of aggression. It was silent on the kind of legal consequences for either states or individuals that had perpetrated aggression.

The states that drafted the Six Power proposal had previously resisted against defining aggression at all. Even though many aspects of the Six Power proposal were criticized, the fact that these six states, who had been very critical on the possibility and desirability of defining aggression, had drafted a proposal to define aggression, was seen as good progress.[346] Between these three drafts, the main areas of difference concerned whether the definition applied to political entities which were not recognized as states, what acts should be listed as aggressive, the role of aggressive intent, the role of the principle of priority, and what would be the legal consequences

[344] Twenty-Fourth Session, Report of Special Committee, Supp. No. 20, A/7620 (1969), p. 7-8, published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 326-264.
[345] Twenty-Fourth Session, Report of Special Committee, Supp. No. 20, A/7620 (1969), p. 8, published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 326-264.
[346] Twenty-Fourth Session, Agenda Item 88, Report of the Special Committee on the Question of Defining Aggression, Report of the Sixth Commission, GAOR Doc. A/7853 (1969), para. 7.

of aggression.[347] And by focusing on those issues, the issue on whether or not there actually should be a definition at all was craftily bypassed.

The reasons why the representatives of the states in the Special Committee eventually agreed to come to a definition varied. For some representatives, a legal definition of aggression would provide guidance for states and for the UN and particularly its Security Council. For others, a definition of aggression was necessary to quell or manage existing international tensions that grew out of the aggressive policies of imperialist and colonialist states. The absence of a definition of aggression, they argued, had made it easier to commit 'crimes against the peoples of dependent countries in all parts of the world, to carry out acts of military aggression against national liberation movements, and to intervene forcibly in the domestic affairs of other states.'[348] Most representatives, however, used a normative argument by stating that a definition of aggression could constitute a legal and political indictment of aggression in any form. The definition would be of fundamental importance for the development of international law, for the maintenance of international peace and security, and as a moral authority.[349] Many also emphasized the expressive effect in that a definition would reinforce the idea that aggression is an international crime and it would help create the system of collective security.[350]

Several representatives argued that no definition was needed but, instead, the *application* of the existing collective security system. The reason that aggression occurred, they asserted, was the lack of willingness of Member States to respect their Charter obligations. A definition would, in their view, create 'an illusion of accomplishment when none in fact had been made.'[351] A normative argument that likewise expressed doubts regarding the value of a definition, especially one with concrete enumerated prohibited acts, claimed that this could inspire aggressors to evade those acts that are enumerated. It would function as a signpost to those acts that were not included as apparently not aggressive; these other acts, just as aggressive or even worse, are then argued not to be prohibited since it was not provided expressly in the definition.[352]

---

[347] Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 10.
[348] General Assembly, Twenty-Third Session, Agenda Item 86, Report of Special Committee, Question of Defining Aggression, A/7185/Rev. 1, p. 13.
[349] General Assembly, Twenty-Third Session, Agenda Item 86, Report of Special Committee, Question of Defining Aggression, A/7185/Rev. 1, at p. 18.
[350] General Assembly, Twenty-Third Session, Agenda Item 86, Report of Special Committee, Question of Defining Aggression, A/7185/Rev. 1, p. 18.
[351] General Assembly, Twenty-Third Session, Agenda Item 86, Report of Special Committee, Question of Defining Aggression, A/7185/Rev. 1, p. 18.
[352] General Assembly, Twenty-Third Session, Agenda Item 86, Report of Special Committee, Question of Defining Aggression, A/7185/Rev. 1, p. 19. See also Julius Stone, *Conflict through Consensus: United Nations Approaches to Aggression* (Johns Hopkins University Press, 1977), and Martti Koskenniemi, who connects the indeterminacy of the crime of aggression to the indeterminacy or unpredictability of the world in which it is supposed to operate and thus to the inherent weakness of such rules, in Martti Koskenniemi, 'A Trap to the Innocent…', in: Claus Kress & Stefan Barriga (eds.),

The method of creating consensus, however, was skillful. As this disagreement on whether or not to have a definition protracted, new and smaller committees, working groups and contact groups were created with the specific mandate to talk about very specific issues, and within the framework of a definition. The discussions were moved to the specificities of the provision rather than whether to have the provision at all. And when the Six Power proposal was presented in 1969, by six states that had previously opposed defining aggression at all, the proposal was embraced (even though disagreed with on various, if not most, substantive aspects) and the discussion turned towards the content of the proposal, framed away from the question of whether or not to define aggression at all.

At the end of the 1971 meeting, there was general agreement that that there should be a definition of aggression. All concurred that there should be a preamble, restating certain basic principles, a generic definition of aggression, an enumeration of specific acts which clearly indicated aggression, a reaffirmation that the Security Council could determine that other acts were also aggressive, and an explanation of when use of force would be permissible.[353] It was also recognized that whether or not there was a declaration of war was no longer significant. Invasion, attack, bombardment, and blockade were acknowledged as indicators of aggression. The more subtle breaches of the peace, such as subversion and fomenting civil strife continued to present difficulties. To work these and other remaining difficulties out, the Special Committee established a 'Working Group,' consisting of 8 members, namely, Cyprus, Ecuador, France, Ghana, the USSR, the United Arab Republic, the United Kingdom, and the United States. The other members of the Special Committee had no vote in the Working Group's session, although they could attend and discuss in their meetings. In the beginning of 1972, it was decided to establish another Working Group, this time composed of Cyprus, Czechoslovakia, Ecuador, France, Ghana, Italy, Mexico, Spain, Syrian Arab Republic, USSR, United Kingdom, United States, and the Special Committee's Rapporteur.[354] The positions were reargued and arguments repositioned, but no breakthrough was achieved.

In 1973, the Working Group resumed its work and installed several 'Contact Groups' to work on specific matters, in smaller groups of representatives. These matters were i) the general definition of aggression, and in particular the terms 'sovereignty' and 'territorial integrity;'[355] ii) the acts proposed for inclusion, the indirect use of force, a

---

The Crime of Aggression – A Commentary (Cambridge University Press, 2016 (forthcoming)). See also Julius Stone, 'Hopes and Loopholes in the 1974 Definition of Aggression ' (1977) 71 *American Journal of International Law* 224-246.

[353] Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 11.

[354] Twenty-Seventh Session, Report of Special Committee, Supp. No. 19, A/8719 (1972), published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 493-509, para. 6.

[355] The First Contact Group consisted of Colombia, France, Ghana, Romania, Syrian Arab Republic, Turkey, USSR and the United States. This Contact Group was requested to consider the text of the general definition of aggression, and in particular the terms 'sovereignty' and 'territorial integrity.'

clause on minor incidents, and the right to self-determination;[356] iii) priority and aggressive intent;[357] and the legal uses of force and the legal consequences of aggression.[358] After meetings had been held for over three weeks, a 'Drafting Group' was established,[359] and on 25 May 1973, the working group had a consolidated text of the reports of the contact groups and of the drafting group.[360] In 1974, the Working Group established three new Contact Groups. Group I was instructed to consider articles 1 and 2 of the consolidated text, group II articles 3-5, and group III articles 6 and 7 of the consolidated text of 1973.[361] A contact group IV was later installed to prepare a new consolidated text in light of the reports of the other contact groups.[362] And so a consensus text was crafted, which was subsequently adopted by the UN General Assembly as the Definition of Aggression. This definition moreover to large extent functioned as the basis for the 2010 ICC crime of aggression amendment, and Article 8*bis*(2) of the Rome Statute reflects Articles 1 and 3 of this 1974 Definition of Aggression.

Among the many contentious issues that arose in defining aggression, those providing the most contention in the drafting of a definition of aggression included the question whether there should be a definition at all, which was craftily dealt with by installing numerous different working or contact groups that each got smaller and smaller issues to deal with, taking the larger contentions off the table, and postponing at strategic moments. The ways in which consensus was reached on the principle of priority, the role of aggression intent, the actors involved in aggression, indirect use of force, and the legal consequences that would arise following a determination of aggression are discussed in the next sub-sections.

[356] The Second Contact Group was instructed to examine the acts proposed for inclusion, the indirect use of force, a clause on minor incidents, and the right to self-determination. It consisted of Bulgaria, Cyprus, France, Ghana, Romania, Syrian Arab Republic, USSR, and two members of the six-Power draft.
[357] The Third Contact Group was to consider the questions of priority and aggressive intent and was composed of Czechoslovakia, Egypt, France, Guyana, Mexico, Spain (later replaced by Ecuador), Turkey, USSR, and two members of the six-Power draft.
[358] The Fourth Contact Group was to consider the legal uses of force and the legal consequences of aggression, and consisted of Czechoslovakia, France, Indonesia, Iraq, Romania, Spain, Turkey, Uganda, USSR and two members of the six-Power group.
[359] The Drafting Group consisted of Canada, Egypt, France, Ghana, Iran, Spain, USSR, and the United States.
[360] Twenty-Eighth Session, Report of Special Committee, Supp. No. 19, A/9019 (1973), published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 519-539, Annex II.
[361] Twenty-Ninth Session, Report of Special Committee, Supp. No. 19, A/9619 (1974), published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 556-598, para. 11.
[362] Twenty-Ninth Session, Report of Special Committee, Supp. No. 19, A/9619 (1974), published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 556-598, para. 13.

4.2.2 The Principle of Priority and the Role of Aggressive Intent

Two of the other main disagreements between the representatives in the Special Committees were on how to deal with the principle of priority (i.e. the idea that the first one to use armed force is the aggressor), and on whether aggressive intent should have a place in the definition. It was eventually decided to bring these two concepts together in one provision.

The 1969 Six Power proposal had included in its draft the role of aggressive intent and included a number of possible intentions for using force, including the diminishing or altering of the territory of another state, the interference with the conduct of the affairs of another State, and to inflict harm or obtain concessions of any sort. According to this proposal, the means that are used, such as invasion or bombardment, only qualify as acts of aggression if it is accompanied by the intent to do so. Many representatives did not agree with this approach to include subjective criteria. Not only would it be impossible to list all possible intentions, they argued, but it would have the effect of inviting war,[363] because aggressors would always claim that their goal was legitimate.[364] Including subjective elements in the criteria to determine aggression would encourage the commission of aggressive acts for purposes not mentioned in such a definition.[365]

Eventually, it was agreed that both the principle of priority and aggressive intent were given a place and it would then be up to the Security Council's discretion how to weigh one against the other. The 1974 definition observed *prima facie* evidence of an act of aggression with regard to the first use of armed force, but allowed that a determination to that effect needed to include other relevant circumstances, such as the 'purposes', i.e. intent, of the states involved.[366] In this way, the provision granted the applicability of the principle of priority without it being absolute. A state that had taken up arms first would on first sight be regarded the aggressor, but the Security Council could then take other relevant circumstances into consideration, such as

[363] Twenty-Fifth Session, Report of Special Committee, Supp. No. 19 A/8019 (1970), published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 372-438, para. 37.
[364] Twenty-Fourth Session, Report of Special Committee, Supp. No. 20, A/7620 (1969), published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 326-364, para. 70.
[365] Twenty-Fourth Session, Report of Special Committee, Supp. No. 20, A/7620 (1969), published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 326-364, para. 70.
[366] *Definition of Aggression*, UNGA Res 3314 (XXIX) (14 December 1974), Article 2, which thus provided for a combined understanding of both the principle of priority and the fact that other circumstances such as aggressive intent should also be accounted for, reads as follows: 'The first use of armed force by a state in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or the consequences are not of sufficient gravity.'

aggressive intent, to determine who the actual aggressor had been.[367] Consequently, the 1974 definition provided that the decision and distinction between aggression and non-aggression was ultimately left to the Security Council.

Article 2 of the 1974 Definition thus provided for a combination of the principle of priority and the possibility to take into account other circumstances such as aggressive intent. It reads as follows:

> 'The first use of armed force by a state in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or the consequences are not of sufficient gravity.'

When the representatives of states were giving their views in the concluding stage of the Special Committee's session, there appeared to be an important difference between the interpretations of what this provision meant. Romania stated that it understood this provision in the sense that the state who uses armed force first, was committing an act of aggression, and that only if the Security Council would be able to reach a decision that 'other relevant circumstances' led to a different conclusion, this would exculpate this state. Yugoslavia supported this view. The United States, however, stated that the first use of force only gives *prima facie* evidence to a determination, meaning that the Security Council had to make a determination on whether or not an act of aggression was committed or not. The United States argued that if the Security Council would not be able to come to a decision that there had actually been an act of aggression, the Security Council must be presumed not to have found the *prima facie* evidence to be persuasive. The United Kingdom supported this view and added that the first use of force should by no means be the sole or determinative piece of evidence.[368]

4.2.3 Indirect Use of Force: the Actors Involved in Aggression

Even though many a danger is now allocated to terrorism, the destructive abilities that individuals have through for instance cyberspace, and other threats that non-state actors may pose, the definition and crime of aggression exclusively focuses on

[367] The Syrian Arab Republic representative was opposed to using the words *prima facie* because, in his opinion, all first uses of force in contravention of the UN Charter constituted acts of aggression, Twenty-Ninth Session, Report of Special Committee, Supp. No. 19, A/9619 (1974), published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 556-598, Annex 1.

[368] Twenty-Ninth Session, Report of Special Committee, Supp. No. 19, A/9619 (1974), published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 556-598, Annex 1.

aggression as acts by states and those whose conduct is attributable to states. The ICC's *crime* of aggression individualizes this to those in a leadership position that are responsible for these state acts, but the assessment of aggression excludes force that is used by non-state actors unless their acts can be attributed to a state.

Some argued that the definition should not only apply to states but to all 'political entities.' The reason was that it would be irrelevant for the victim whether the aggressor was a state or some other political entity. Other representatives disagreed because it would blur the distinction between international conflicts and civil wars. They argued that such an inclusion would encourage certain states to use force against national liberation movements while invoking the self-defense argument against them.[369] The term 'political entities' was derived from the Six Power proposal. Several representatives were opposed to the use of this term because it would require the Special Committee to include in the text definitions of the terms 'states' and 'political entities,' and they believed this to be yet another complication in an already complex process. They preferred that the definition of aggression would only apply to states since they were argued to be the only 'full subjects of international law and the only "political" entities that could commit or be the victims of an act of aggression.'[370] And thus, the definition of aggression only applies to states as perpetrators or victims of aggression.

Moreover, there was the long discussed topic of whether or not to include indirect use of force into the definition of aggression. Indirect use of force is force that is not used through the armed forces of a state, so called direct use of force, but, for instance, through armed bands, groups, irregulars or mercenaries. Terrorist acts could also fall under this category. The main argument for excluding indirect use of force was the scope of the right of self-defense.[371] Some representatives argued that including indirect aggression would authorize self-defense in cases where it was now prohibited by Article 51 of the UN Charter. As discussed in the previous chapter, the interpretation explained by the ICJ in the more recent *Armed Activities* case, for example, provides that Article 51 only allows for self-defense in the case of armed attack by a state and indirect aggression could be interpreted in many ways, including not being an *armed* attack at all, or being an act of terrorists.

Other representatives considered that the concept of indirect or covert uses of force needed to be included *in order to* conform to the UN Charter. They argued that these forms of the use of force represented as great a threat to international peace and security as direct forms, and were consequently comprised in the term 'aggression' as

[369] Twenty-Fifth Session, Agenda Item 87, Report of the Special Committee on the Question of Defining Aggression, Report of the Sixth Commission, GAOR Doc. A/8171 (1970), para. 17.
[370] Twenty-Sixth Session, Report of Special Committee, Supp. No. 19, A/8419 (1971), published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 446-484, para. 22.
[371] Twenty-Sixth Session, Report of Special Committee, Supp. No. 19, A/8419 (1971), published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 446-484, para. 26.

used in the UN Charter.[372] They argued that the limits of the right of self-defense were not derived from the means employed by the aggressor, but from the basic objective of self-defense, and that this objective is to safeguard the state, its government and institutions. This argument thus followed the 'necessity'-reasoning I discussed previously, which reasons from the need to defend oneself rather than making the right to defend contingent on whether or not a right is violated that meets the threshold of 'armed attack' that can be attributed to another state (the 'justice'-approach). If these national interests were at stake, they argued, the state had a right to exercise self-defense and use force. These representatives argued that it was impossible to determine *a priori* whether states had the right to use self-defense, but that this should be assessed by the states themselves or by the Security Council. Therefore, it was argued that it was not possible to establish general rules that would make the exercise of the right of self-defense dependent on a distinction between direct and indirect aggression and thus whether the attack came from a conventional army or by sending other groups or means.[373]

Those arguing that direct uses of force alone should justify the exercise of the right of self-defense, stated that only direct aggression should be included in the definition,[374] and argued that in case of an act of indirect force, the victim state had no right to self-defense under Article 51 of the UN Charter, but had to appeal to the Security Council to take action.[375] They admitted, however, that there were 'marginal cases in which the infiltration was so substantial and the danger so great that they were tantamount to an armed attack and justified the exercise of the right of self-defense (…).'[376] Even though they argued that, in general, the definition would only apply to direct forms of armed aggression, this situation would have to be provided for in the definition as well.

On this basis, a consensus was reached that an article 3(g) would provide for indirect armed force, but contention still remained on its scope. One fear was that a too broad or open provision might legitimize a right to make a pre-emptive strike.[377] The proposal in the 1973 consolidated text included that a state's active and open

[372] Twenty-Fourth Session, Agenda Item 88, Report of the Special Committee on the Question of Defining Aggression, Report of the Sixth Commission, GAOR Doc. A/7853 (1969), para. 13.
[373] Twenty-Sixth Session, Report of Special Committee, Supp. No. 19, A/8419 (1971), published in Twenty-Sixth Session, Report of Special Committee, Supp. No. 19, A/8419 (1971), published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 446-484, para. 28.
[374] Twenty-Sixth Session, Report of Special Committee, Supp. No. 19, A/8419 (1971), published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 446-484, para. 27.
[375] Twenty-Sixth Session, Report of Special Committee, Supp. No. 19, A/8419 (1971), published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 446-484, para. 27.
[376] Twenty-Sixth Session, Report of Special Committee, Supp. No. 19, A/8419 (1971), published in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 446-484, para. 27.
[377] UN General Assembly, Report of the Special Committee on the Question of Defining Aggression, UNGA Doc. A/9411 (10 December 1973), para. 22.

participation in indirect use of force would amount to aggression. Critics that opposed this for being too open found it unacceptable that states that helped to organize or encouraged groups, would be acting aggressively independently from the question of whether or not that state also participated in sending these groups on incursions.[378] In contrast, other representatives, including Indonesia and Guyana, found the proposed provision too *narrow*. They held that the provision should be worded as to be applicable to a state which organized or encouraged civil strife or terrorist acts on the territory of another state.[379] These states all found that indirect force should be prohibited and sanctioned in the same way as direct force, and should include all acts in which a state participates in some way or the other in the commission of the aggressive acts.[380]

Eventually, the 1974 definition's Article 3(g) read as follows:

> "The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein."[381]

This provision was followed by Article 4, which provides that that the acts listed in Article 3 are not exhaustive and that the Security Council had the power to determine other acts to be aggressive.[382]

4.2.4 The Legal Consequences of an Act of Aggression

For a long time, the section on the legal consequences of aggressive acts remained unsettled. The debate consisted of two separate issues. The first was whether territorial gains could follow from aggressive acts. There was a general consensus that this was against international law and the debate around this topic revolved around issues like whether it should be included at all for those who argued that it was

[378] UN General Assembly, Report of the Special Committee on the Question of Defining Aggression, UNGA Doc. A/9411 (10 December 1973), para. 22.
[379] UN General Assembly, Report of the Special Committee on the Question of Defining Aggression, UNGA Doc. A/9411 (10 December 1973), para. 23.
[380] The United States took yet another position and suggested to include, instead of Article 3(g), a separate provision on indirect uses of force, namely: The organization by a State, or encouragement of the organization of, or assistance to, irregular forces or armed bands or other groups, volunteers, or mercenaries, which participate in incursions into another State's territory or in the carrying out of acts involving the use of force in or against another State, or knowing acquiescence in organized activities within its own territory directed toward and resulting in the commission of such acts.' UN General Assembly, Report of the Special Committee on the Question of Defining Aggression, UNGA Doc. A/9411 (10 December 1973), para. 23.
[381] *Definition of Aggression*, UNGA Res 3314 (XXIX) (14 December 1974).
[382] Article 4, Consolidated text, Twenty-Eighth Session, Report of Special Committee, Supp. No. 19, A/9019 (1973), published in: Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 519-539), Appendix A.

already a clear norm of international law, and how it should be formulated if it was to be included. The consensus definition of 1974 included that '*[n]o territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.*'[383]

The other, more difficult, question on legal consequences was whether and what kind of legal responsibility should arise for the acting state and/or individual. During the debates, there were five alternatives on the table. First, that aggression constitutes 'a grave violation', second, 'a crime', and third, 'a criminal violation.' The fourth option was to be silent on legal consequences of aggression. The fifth option was to insert that 'aggression gives rise to responsibility under international law,'[384] which eventually was chosen. Those in favor of inserting that an act of aggression constitutes a crime against international peace that gives rise to responsibility under international law argued that contemporary international law accepted that principle. This was derived from the Nuremberg and Tokyo Tribunals and their principles that had been widely accepted by states.[385] Of course, this was a weak argument, since in fact in San Francisco the founding members of the United Nations had been unable to reach agreement on whether or not legal consequences should be attached to aggressive use of force. Those representatives that argued that no provision should be included on legal consequences of aggression expressed grave doubts regarding the necessity for such an article. They argued that whether and to what extent responsibility arises belonged to the law of state responsibility and did not belong in the search for a definition of aggression.[386]

Eventually, consensus was reached, and Article 5(2) reads as follows: '*A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.*'[387] Many representatives, however, thought it was a mistake to introduce the new term 'war of aggression' here instead of using the terms 'acts of aggression' that were used throughout the definition. The Spanish delegate, for instance, stated that the reference to a *war* of aggression could not be interpreted to mean that that concept – war of aggression – had been adequately defined by the definition of aggression and found it a vulnerable point in the draft.[388] Yugoslavia likewise expressed its disappointment on the use of the phrase 'war of aggression' and stated that it would have liked to see an act of aggression as a crime against

[383] Article 5(3) of *Definition of Aggression*, UNGA Res 3314 (XXIX) (14 December 1974).
[384] Comments contained in the reports of the contact groups and of the drafting group, Twenty-Eighth Session, Report of Special Committee, Supp. No. 19, A/9019 (1973), published in: Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 519-539, Appendix A.
[385] UN General Assembly, Report of the Special Committee on the Question of Defining Aggression, UNGA Doc. A/9411 (10 December 1973), para. 29.
[386] UN General Assembly, Report of the Special Committee on the Question of Defining Aggression, UNGA Doc. A/9411 (10 December 1973), para. 30.
[387] *Definition of Aggression*, UNGA Res 3314 (XXIX) (14 December 1974).
[388] Twenty-Ninth Session, Report of Special Committee, Supp. No. 19, A/9619 (1974), published in: Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 556-598, Annex 1.

international peace. This would, in the representative's view, more accurately follow the Nuremberg and Tokyo precedents. This position was shared by the USSR. According to Yugoslavia, this wording would create a way to argue that an act of aggression is not a crime. Bulgaria shared their concern for omitting to provide that 'aggression' rather than a 'war of aggression' was a crime against international peace.

Their concerns proved right, and the discussion re-emerged in the discussions on including the crime of aggression in the ICC. But, only by leaving out any reference to the kind of responsibility and including the broader and undefined term 'war of aggression' was agreement possible. By changing 'acts of aggression' into a 'war of aggression,' enough leeway would exist within the definition to argue that certain prohibited uses of armed force do not qualify as wars of aggression, and are therefore not the worst imaginable offence.

In its reaction to the final text of the 1974 definition, the Japanese representative concluded that, at least for now, Article 5(2) only refers to state responsibility and that the question of individual responsibility for an act of aggression should be left for future study.[389] France agreed on this point and added that this text was acceptable to the extent that it 'merely noted the present status of international law without prejudging its development.'[390] Australia pointed out that it had been anxious that any reference to criminal responsibility should not be construed as implying any individual responsibility, which the present text in Australia's view did not. Notably, the United States and the United Kingdom read in this provision a continued validity of the principles which formed the basis of the Nuremberg and Tokyo Tribunals, as well as state responsibility.[391]

4.2.5 Consensus: Agreeing to Disagree, Agreeing to Delegate Disagreement Elsewhere

Within the Definition of Aggression, all interpretations of the legal consequences of committing aggression were thus maintained, as was the substantive contention on what aggression exactly is. This substantive space was kept open to be decided by the Security Council. In the end, the combined elements of allowing the ultimate decision of what aggression is up to the Security Council, restricting the definition to aggression to the more manageable scope of states rather than including non-state

[389] Twenty-Ninth Session, Report of Special Committee, Supp. No. 19, A/9619 (1974), published in: Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 556-598, Annex 1.
[390] Twenty-Ninth Session, Report of Special Committee, Supp. No. 19, A/9619 (1974), published in: Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 556-598, Annex 1.
[391] Twenty-Ninth Session, Report of Special Committee, Supp. No. 19, A/9619 (1974), published in: Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 556-598, Annex 1.

actors, and keeping the legal responsibility for aggression vague and disagreed upon, enabled that a definition was thus adopted in 1974. Those partaking in this deliberative practice agreed what they could agree upon and delegated what was disagreed upon elsewhere, in the political playing field where this discursive practice continued, with the Security Council as its institutionalized space.

But what is its worth? The purpose of this 1974 definition was fourfold: i) to serve as a guideline to the Security Council, ii) to deter the taking by the aggressor of any of the proscribed acts, iii) to help mobilize public opinion in case of aggression, and iv) to help facilitate immediate assistance to the victim of aggression by other states.[392] The history of the following decades showed that the definition did not meet its four purposes and was widely regarded as vague and toothless. And even when the final draft was discussed in the Special Committee, the United Kingdom maintained that the definition constituted a 'valuable guidance to the Security Council – no less and no more – in performing its functions under Article 39 of the Charter,' and that the definition did not have the binding force of domestic law.[393]

Thus, even at the moment of reaching a consensus definition in 1974, disagreements that go to the heart of the definition of aggression maintained and were left unsettled. Not surprisingly, they raised their head again in the subsequent developments in regulating and criminalizing aggression.

4.3 After 1974: Towards the Crime of Aggression

After 1974, the debate on aggression continued, but the notion of aggression seemed to disappear into the background more and more. The 1974 Definition was never mentioned in the Security Council to condemn a state for committing aggression, and was rarely invoked elsewhere. In the words of Simpson, the 'most serious blow to the juridification project' for the criminalization of aggression was the leaving out of the 'crime of crimes' in the tribunalization of the 1990s.[394] Even though grave breaches to the Geneva Conventions were included, at that time only applicable to international armed conflict, aggression was missing from the statutes international criminal tribunals. Simpson suggests that this was likely due to the lack of belief by the UN Secretary-General and the Security Council that aggression had sufficient contemporary standing as a crime or that its inclusion would have politicized the tribunal by getting it enmeshed in the political issues surrounding the conflict.[395]

---

[392] Louis B. Sohn, *Introduction*, in Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 1* (Oceana Publications Inc., 1975), at 1.
[393] Twenty-Ninth Session, Report of Special Committee, Supp. No. 19, A/9619 (1974), published in: Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 2* (Oceana Publications Inc., 1975), at 556-598, Annex 1.
[394] Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 150.
[395] Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 150.

Meanwhile, the International Law Commission (ILC) had also been considering the notion of aggression, in particular with regard to three of its projects: the ILC Draft Code of Crimes Against the Peace and Security of Mankind, the ILC Draft Statute for an International Criminal Court, and the ILC Draft Articles on State Responsibility. In each of these projects, the crime of aggression had played a relatively prominent role,[396] but was scarcely present or relevant in them in the end. The ILC rejected the 1974 definition because it was too vague to serve as a basis for the prosecution of a crime of aggression.[397] In 1996, the International Law Commission adopted the Draft Code of Crimes against Peace and Security of Mankind, which provided for individual *criminal* responsibility with respect to a leader or organizer for the crime of aggression, based on the individual's participation in acts of aggression committed by a state.[398] However, the draft Code did not provide a detailed definition of *what* the crime of aggression entails, and quietly dropped from the international agenda.[399] The eventual statute for the ICC that was adopted in 1998, the Rome Statute, excluded jurisdiction over aggression until a provision would be adopted defining the crime and setting out the conditions under which the Court could exercise jurisdiction with respect to the crime of aggression. The ILC's Articles on State Responsibility were adopted in 2001 but without reference to the crime of aggression. After years of debate, the International Law Commission decided to delete any reference to the concept of 'international crimes,' including the crime of aggression, from the Draft Articles on State Responsibility. The drafters could, *again*, not agree on the legal consequences for such crimes other than those already existing under the state responsibility and United Nations regimes.[400] However, the *peremptory* status of the concept of aggression was still recognized under the chapter on 'Serious breaches of obligations under peremptory norms of international law.' According to the Articles on State Responsibility, other states are under an obligation 'to cooperate to bring to an end, through lawful means, the serious breach of the specific obligation and to not recognize as lawful any situation created by such a serious breach.'[401]

In 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute of the International Criminal Court. Since the Nuremberg Tribunal had held that aggression '… is the supreme international crime differing only from other war crimes in that it

[396] Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 151.
[397] Michael J. Glennon, 'The Blank-Prose Crime of Aggression' (2010) 35 *The Yale Journal of International Law* 71-114, at 79; See Report of the International Law Commission on the Work of Its 48th Session, U.N. GAOR, 51st Sess., Supp. No. 10, at 9, U.N. Doc. A/51/10 (1996); see also William Schabas, *An Introduction to the International Criminal Court*, 3rd edn (Cambridge University Press, 2007), at 135.
[398] *Yearbook of the International Law Commission* (Vol. II, Part Two, 1996), chap. II.D, para. 50.
[399] Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 151.
[400] *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* (Vol. II, Part Two, 2001), p. 278-279.
[401] Art. 41 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* (Vol. II, Part Two, 2001).

contains within itself the accumulated evil of the whole,'[402] when the ICC was created in Rome in 1998, for many the inclusion of the crime of aggression was essential: without the crime of aggression, international criminal law would be incomplete. Nevertheless, and despite the consensus definition of 1974, the question of the crime of aggression was one of the central points of contention during the Rome Conference.[403] The problem that resurfaced was how to limit the possibilities of others to commit aggressive war, whilst maintaining one's own possibilities to resort to force when convinced of its necessity and/or justness. Because of the inherent over- and underinclusiveness of rules, drawing any line distinguishing between aggression and non-aggression would include situations that were regarded as unwelcome, and exclude situations that were believed that should not be excluded,[404] and would now be regarded as international crime, at the top of the pyramid of moral condemnation. This pertained particularly to situations in which self-defense was believed to be called for and prudent, despite the absence of an (imminent) 'armed attack' in the traditional sense, and for 'bona fide' unilateral humanitarian interventions.

For example, Leclerc and Byers argue that when the Security Council fails to act in the face of gross human rights violations, a humanitarian intervention may be the only available option to stop mass atrocities. Even though such interventions remain illegal under international law, they assert that 'the definition of aggression must preserve international stability by maintaining the existing rules on the use of force while, at the same time, allowing the occasional bona fide humanitarian intervention to take place.'[405] And that providing the ICC with jurisdiction over the crime of aggression if not excluding such bona fide humanitarian uses of force, could deter those very few interventions that are principally aimed at protecting fundamental human rights.[406] They therefore argued for a test on whether the person's principal motivation for deciding to use force is a genuine humanitarian desire to prevent gross human rights violation.[407]

Similar arguments are made by others as well, as well as pertaining to other aspects of the distinction between aggression and non-aggression. Disagreements thus persisted: on how to include aggression into the ICC Statute, how to define the crime of aggression, what its scope would be, and what the role of the Security Council would

[402] United States of America et al. v. Goering et al., International Military Tribunal, Judgment, 30 September – 1 October 1946, (1947) 41 Am J. Int'l L. 172, at p. 186.
[403] Stefan Barriga, 'Negotiating the Amendments on the Crime of Aggression', in Kress (ed.), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), 3-57, at 5
[404] Frederick Schauer, *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press, 1991).
[405] Elise Leclerc-Gagne & Michael Byers, 'A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention' (2009) 41 *Case Western Reserve Journal of International Law* 379-390, at 384.
[406] Elise Leclerc-Gagne & Michael Byers, 'A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention' (2009) 41 *Case Western Reserve Journal of International Law* 379-390, at 385.
[407] Elise Leclerc-Gagne & Michael Byers, 'A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention' (2009) 41 *Case Western Reserve Journal of International Law* 379-390, at 387.

be. Despite these disagreements, when the ICC's Rome Statute was agreed upon in Rome in 1998, the founding parties did come to agree on including the crime of aggression in the subject matter jurisdiction of the ICC, together with genocide, crimes against humanity and war crimes. They included a provision in Article 5 of the (old) ICC Statute that recognized the crime of aggression but provided that the ICC would only exercise jurisdiction over the crime of aggression once an amendment was adopted that defined the crime and settled the conditions under which the ICC would exercise jurisdiction with respect to the crime of aggression, and in conformity with the UN Charter.[408] It would take until 2010, before the Assembly of States Parties of the ICC (ASP) adopted an amendment to the Statute in Kampala, Uganda, in which the jurisdiction of the ICC was expanded to include the crime of aggression. This process from Rome to Kampala, was another process characterized by many negotiations, in many working groups, leading, eventually, to the Kampala Compromise.[409]

From 1999 to 2002, the Working Group on the Crime of Aggression of the Preparatory Commission specified the thematic list of issues to be discussed, but the states parties were mostly engaged with establishing the ICC as such, which occurred in 2002. Afterwards, the work was continued by the Special Working Group on the Crime of Aggression. Eventually, the ASP came together in May/June 2010 at the Review Conference that was held in Kampala, Uganda, to further negotiate and see where compromise and consensus was possible. On the final day, on 11 June 2010 (in fact, beyond the deadline, as it was generously past midnight by that time), the ASP adopted a consensus agreement to expand the jurisdiction of the ICC to include the crime of aggression. Provided that a majority decision is taken after 1 January 2017 to activate the ICC's jurisdiction and a sufficient number of ratifications (30) of the aggression amendment is reached, the ICC will in the future be able to prosecute individuals for their leading role in the use of aggressive force.

The compromise that was reached provides that the different triggers of the ICC system are split between an Article 15*bis* (for state referral and the Prosecutor's *proprio motu* powers) and 15*ter* (for Security Council referral). In case of a Security Council referral of a situation to the ICC there shall be immediate triggering of jurisdiction; for the *proprio motu* and state referral powers, the prosecutor is allowed to start the investigations after six months of inactivity by the Security Council, provided that the Pre-Trial Division has authorized the investigation in accordance with Article 15, and that the Security Council had not decided otherwise in accordance with their powers under Article 16 to defer the investigation for a year (which is renewable). The Kampala compromise furthermore contains postponement clauses in paragraphs 2 and 3 of both Article 15*bis* and 15*ter* to delay the entry into

[408] Article 5(2) (old) Rome Statute.
[409] See for a thorough description of the Princeton Process and the negotiations, Stefan Barriga, 'Negotiating the Amendments on the Crime of Aggression', in Kress (ed.), *The Traveaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), 3-57, at 5

force until at least 2017,[410] an opt-out clause for any state that does not want to fall under the ICC's jurisdiction for aggression, and excludes non-State Parties from the jurisdiction over aggression even if the alleged aggression would be committed by those states on the territory of a State Party (Article 15bis(5)), unless the situation is referred to the ICC by the Security Council.[411]

Comparable to the 1974 process, but arguably even further perfected and executed, was the manner in which the Chairmen of the Special Working Group (first Christian Wenaweser and later Prince Zeid of Jordan when Wenaweser became president of the ASP) were able to create consensus. In coordination with a small number of 'insiders,' they managed to dominate the agenda setting and create a pragmatic atmosphere where disagreements were circumvented through the sub- and subdivision of topics in sub- and subgroups in which they were discussed. The discussions in the Special Working Group were focused on the papers that were drafted under the sole authority of the Chairman. These papers were presented and understood as reflecting, at least 'to a reasonable extent, the variety of views in the room.'[412] As Stefan Barriga, one of the trusted advisers to the Chairman throughout the process, describes: 'Over the course of time, this technique allowed delegations to identify "an emerging consensus" on various issues, and made it more difficult for delegations to bring up proposals that deviated from the thrust of the Chairman's papers.'[413]

Yet, it was also a repeated rehearsal of hiding persistent fundamental disagreement behind euphemisms like 'consensus.' In 1977, discussing the 1974 definition, Julius Stone raised a number of critical reflections that appear no less applicable to the developments in the decennia that followed and to the 2010 crime of aggression amendment. For example, he raised the question whether rather than resolving critical conflicts, the definition instead 'codified or otherwise preserved (…) within the intricately interwoven equivocations, contradictions or silences of what its authors presented as a "delicately balanced" text, based on "fragile" consensus (…).' And, '[t]he Consensus Definition might then represent a triumph of verbal skills in using such devices to conceal conflicts. It would certainly, as will be seen, illustrate the role in definitional debates of the strategy and tactics of political warfare as well as the role of "consensus" on verbal formulae as a triumph of face-saving for the Fourth Special Committee and the Twenty-Ninth General Assembly, to avoid adding still

[410] With regard to the postponement clauses, both a Security Council referral (article 15ter) and a state referral or *prioprio motu* investigation (article 15bis) provide that the ICC may only exercise jurisdiction when a collective decision of the States Parties after 1 January 2017 has been taken *and* if at that time one year has passed since the ratification or acceptance of the amendment by at least 30 states.

[411] Unlike the state referral/*proprio motu* jurisdictional triggers, if the Security Council refers a case to the ICC, the ICC also has jurisdiction over aggression committed by non-state parties.

[412] Stefan Barriga, 'Negotiating the Amendments on the Crime of Aggression', in Kress (ed.), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), 3-57, at 18

[413] Stefan Barriga, 'Negotiating the Amendments on the Crime of Aggression', in Kress (ed.), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), 3-57, at 18

another failure to the half-century of vain efforts to define aggression which had gone before.'[414]

4.3.1 Creating Consensus on the Crime of Aggression

Comparable to the discussions on defining aggressions during the process towards the 1974 definition, there was again discussion on the scope of the definition of aggression and whether the definition should be generic or, instead, a specific provision. There were three approaches here. The first, preferred by a number of Arab states, Iran, Egypt and Italy, was that there should be a specific definition that referred to a list of concrete acts, like Article 3 of the 1974 definition.[415] The second approach was that a generic definition would suffice. This could be combined with a threshold clause (which eventually became the 'manifest violation' of the UN Charter-provision) as Germany proposed, or that a generic definition would not need such a threshold clause (such as proposed by Greece and Portugal).[416] A generic definition would focus on general terms like 'use of force' or 'armed attack' rather than specify which acts would constitute aggression. The third approach was to define aggression as whatever the Security Council would determine to constitute aggression in a specific case, with binding effect for the ICC. This latter approach was (not surprisingly) preferred by the permanent members of the Security Council,[417] who could then entirely control over which situation the ICC would have jurisdiction with their veto power in the Security Council. This was unacceptable to almost all other states as incompatible with the idea of an independent court applying criminal law in search for justice, which requires some separation from the power of those that are subject to its jurisdiction. In the end, the proponents of the generic approach indicated their flexibility on the clear condition that a specific definition with a list of examples (which became a copy of the 1974 definition's Article 3 enumeration) would be accompanied by a high-threshold clause.[418]

They thereby adopted the 1974 definition of aggression as the core for the crime of aggression amendment to the ICC. Whilst it is entirely understandable from a pragmatic 'agreement-as-an-end-in-itself'-approach that keeping what was already agreed upon before was the easiest (and perhaps only) way to achieve consensus here, it also means adopting normative foundations for the crime of aggression that were problematic to begin with. Kai Ambos criticized the Kampala outcome as an

[414] Julius Stone, *Conflict through Consensus: United Nations Approaches to Aggression* (Johns Hopkins University Press, 1977), at 21.
[415] 1997 Proposal by Egypt and Italy; 1998 Proposal by Arab States and Iran; 1999 Proposal by Arab States.
[416] 1999 Proposal by Germany; 2000 Proposal by Germany; 1999 Proposal by Greece and Portugal; 2000 Proposal by Greece and Portugal.
[417] 1999 Proposal by the Russian Federation.
[418] Stefan Barriga, 'Negotiating the Amendments on the Crime of Aggression', in Kress (ed.), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), 3-57, at 25.

'unprincipled approach' in the construction of the crime of aggression concerning the underlying normative foundation and justification of the international core crimes. He asserted that it is rather unhelpful to ignore such underlying normative questions with reference to glorified Nuremberg and Tokyo precedents and policy-driven, pragmatic, predominantly positivist and anti-normative approach since such questions will haunt the international criminal justice project and resurface in court.[419]

Later chapters will turn back to some of the challenges this open crime of aggression definition may bring in a criminal court of law in more detail. However, the next section on the threshold clause already provides insight into why and how this definition, even if it provided a 'success' and 'historic achievement' in terms of creating diplomatic 'agreement,' is rather problematic as actual legal denominator in a criminal court of law.

4.3.2 The Threshold Clause of 'Manifest Violation'

This threshold clause to compromise on the issue of the specificity of the definition eventually became the provision that a crime of aggression was 'an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.' The threshold clause was inserted to distinguish minor incidents and legally controversial cases from criminalization.[420] Some delegations rejected the idea of a threshold clause because it would distinguish between acts of aggression that were worth prosecuting and others that were not but still comprised aggression, thus undermining the definition of aggression that was agreed upon in 1974. This was countered by other delegations with the argument that it was necessary to ensure that the ICC would only take up 'the most serious crimes of concern to the international community'[421] and not decide on borderline cases and acts whose illegality would be debatable.[422]

Many commentators have rightly pointed to the vagueness and ambiguity of this threshold clause. According to Article 46(2) of the Vienna Convention on the Law of Treaties, a violation of domestic law can be invoked as manifest 'if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.' The Oxford English Dictionary holds that manifest means 'clearly revealed to the eye, mind, or judgement; open to view or

[419] Kai Ambos, 'The Crime of Aggression after Kampala', in *German Yearbook of International Law* (Duncker & Humblot, 2010), vol. 53, 463-511, at 478-481.
[420] Kai Ambos, 'The Crime of Aggression after Kampala', in *German Yearbook of International Law* (Duncker & Humblot, 2010), vol. 53, 463-511, at 482-483.
[421] Referring to the Preamble of the Rome Statute.
[422] Stefan Barriga, 'Negotiating the Amendments on the Crime of Aggression', in Kress (ed.), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), 3-57, at 29

comprehension; obvious.'[423] As Andreas Paulus observed, on the one hand, this amounts to an extremely restrictive standard, but it is also an unclear standard, as what 'is obvious for one is completely obscure to the other, in particular in international law.'[424] Pointing to this disagreement, he submits that the definition is therefore indeterminate.[425] Dapo Akande agrees with Paulus, asserting how this 'obviously illegal' requirement effectively provides for a 'mistake of law'-defense that is unavailable to the other crimes.[426] Sean Murphy moreover notes that it is a remarkable development to include a provision that says that some acts of aggression are thus not criminal, and that even though the UN places aggression on the high end of coercive measures, an act of aggression may not be a 'manifest' violation of the UN Charter.[427] Kai Ambos holds that the lack of precision of the threshold clause is embedded in the primary norm regulating the use of force, and that because it is not possible to clearly delimitate lawful from unlawful use of force, no secondary norm could be drawn any clearer.[428] In addition to those concerns, since the crime of aggression tries to distinguish between illegal uses of force that are and are not considered aggressive, all this becomes even more rickety, as it treads the field of the legitimacy as well as legality of use of force.

It also became clear in Kampala as well as in subsequent Assembly of States Parties meetings that it was unclear and disagreed upon what this 'manifest'-criterion exactly means. In abstraction, there was agreement that manifest was intended to exclude grey areas from the scope of the crime of aggression. See for instance this statement in the report on the June 2008 Special Working Group meeting: 'Delegations supporting this threshold clause noted that it would appropriately limit the Court's jurisdiction to the most serious acts of aggression under customary international law, thus excluding cases of insufficient gravity and falling within a grey area.'[429] Nevertheless, this didn't erase the disagreement on what a grey area is when the grey itself is contested, which occurs when you slide beyond the (il)legality question to the (il)legitimacy question.

---

[423] Entry 'manifest, adj. and adv.', Oxford English Dictionary Online (August 2014), available at http://www.oed.com/view/Entry/113483?rskey=NQgU19&result=2&isAdvanced=false#eid.
[424] Andreas Paulus, 'Second Thoughts on the Crime of Aggression' (2009) 20 *European Journal of International Law* 1117-1128, at 1121.
[425] Andreas Paulus, 'Second Thoughts on the Crime of Aggression' (2009) 20 *European Journal of International Law* 1117-1128, at 1123.
[426] Dapo Akande, Prosecuting Aggression: the Consent Problem and the Role of the Security Council (2010), Oxford Legal Studies Research Paper No. 10/2011, Oxford Institute for Ethics, Law, and Armed Conflict, available at
SSRN: http://ssrn.com/abstract=1762806or http://dx.doi.org/10.2139/ssrn.1762806.
[427] Sean D. Murphy, 'Aggression, Legitimacy and the International Criminal Court' (2009) 20 *European Journal of International Law* 1147-1156, at 1150-1151.
[428] Kai Ambos, 'The Crime of Aggression after Kampala', in *German Yearbook of International Law* (Duncker & Humblot, 2010), vol. 53, 463-511, at 483-484.
[429] Stefan Barriga, Wolfgang Danspeckgruber & Christian Wenaweser, *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003-2009* (Lynne Rienner Publishers, 2009), at 87, para. 68.

Among the diplomatic community there are two interpretations of this 'manifest violation'-threshold. The first is that 'manifest' simply excludes all situations that can be argued to be lawful or legitimate and are therefore not manifest violations. For example, the question of the aggressiveness of the Russian intervention in the Crimea would in this scenario be decided in favor of Russia because even if Russia's argument that they were invited by the legitimate authorities of the Crimea fails, its arguments that the purpose of its military presence is to protect ethnic Russians in an unstable and chaotic period that borders on or already constitutes civil war, and as such a responsibility to protect type argument, would then fail to be manifestly a violation of the UN Charter according to some, because it can be argued to be legitimate, comparable to other interventions where human rights were at stake. This 'manifest as excluding all that is contentious'-interpretation thus excludes all that can be *argued* to be not at odds with the UN Charter, which, due to the large breadth of the UN's activities and aims, spreads over almost the entire span of human interactivity. As there are few situations that a lawyer with some talent cannot make an argument for, there are many that disagree with this interpretation of the 'manifest'-criterion because it would make the crime of aggression practically a dead letter provision at birth.[430]

As was discussed in the previous chapters, the contention lies not so much with lawful force (authorized by UN Security Council or in self-defense), but with distinguishing between illegal wars that are or are not considered aggression. The second interpretation of the 'manifest'-criterion is that it distinguishes between aggression on the one hand and 'illegal but legitimate' wars on the other: wars that may be illegal but are not aggressive because they are legitimate, such as for humanitarian purposes for some, or for protecting sovereignty for others, to name a few possible justifications.[431] This interpretation of 'manifest' thus does not exclude all that can be argued to be not manifestly at odds with the UN Charter but understand the 'manifest'-criterion as distinguishing criterion on ultimately the 'legitimacy of force'-question. Within this interpretation of 'manifest as legitimacy criterion,' disagreement on how the purposes of the UN Charter need to be interpreted and weighed against each other, and thus disagreement on the nature of world order, is transposed to the application of criminal law on the actions of individuals that allegedly commit aggressive war. For example, a humanitarian intervention is aggression because it is the purpose of the UN Charter to prevent war,[432] and a humanitarian intervention is *not* aggression because it is the purpose of the UN Charter to protect human rights[433] and thus individuals against harm committed by

[430] See for instance Andreas Paulus, 'Second Thoughts on the Crime of Aggression' (2009) 20 *European Journal of International Law* 1117-1128, at 1123-1124.
[431] The Independent International Commission in Kosovo called the NATO bombing campaign on Serbia 'illegal but legitimate,' Independent International Commission in Kosovo, *Kosovo Report* (2000).
[432] See Art. 1(1) of the UN Charter, as well as the opening sentence of the Preamble: 'to save succeeding generations from the scourge of war'.
[433] See Art. 1(3) UN Charter as well as its Preamble for references to human rights.

their oppressive regimes. More specific, NATO's 1999 bombings is a manifest violation of the UN Charter and thus aggression because it is the *main* purpose of the UN to prevent war and to protect individuals 'from the scourge of war.'[434] To use war to make peace or to stop human rights abuses is still war, and thus not in conformity with this reading of the UN Charter unless authorized by the Security Council or in self-defense. Others, however, will argue that NATO's bombing of Belgrade was, instead, not a manifest violation, and thus not aggression, because, for instance, it is intended to protect civilians from harm and against human rights abuses, which is one of the goals of the UN.[435]

Whatever may be the 'correct' interpretation or application of the *ius ad bellum*, the 'manifest'-criterion of Article 8*bis* Rome Statute does not solve or overcome the fundamentality of the disagreement underlying the notion of aggression, which is caused by contradicting underlying assumptions on what use of force is legitimate and what not.

Those arguing for its legitimacy and those, on the contrary, arguing for its aggressiveness both may not find the case of NATO's Kosovo intervention in 1999, or for instance that of the US/UK invasion in Iraq in 2003 hard cases. Depending on one's assumptions related to worldviews and the function of the use of force, these examples may even be regarded as either *clearly* or, instead, *clearly not* manifest violations, and thus clearly are or clearly are *not* criminal. That the application of criminal law with its traditional concepts such as the principle of legality to the crime of aggression with this interpretation of 'manifest' is problematic, seems obvious. The distinction between the hero and supreme criminal thereby becomes rather flimsy. Because resort to force revolves around paramount issues of human rights protection as well as large-scale death and destruction, a consequence of the conflicting interpretations of what aggression comprises, is that what one perceives an heroic intervention, saving the lives of innocent victims, following perhaps a responsibility to protect, another may find supremely criminal, namely aggression. This causes tensions for the application of criminal law understood in its traditional sense: with its fundamental principle of legality, the presumption of the ability to distinguish between good and bad, and its inherent vertical relation between the law enforcer (embodied by those fighting on the good side) and the criminal (the aggressor), which next chapters explore further.

As was seen in the discussions after the NATO bombings on Serbia in 1999 for which the 'illegal but legitimate'-phrase was coined, in these discussions on the interpretation of the 'manifest'-criterion, with this 'manifest as legitimacy criterion'-

[434] Preamble UN Charter, Article 1(1) and especially Article 2(4) UN Charter. See for more discussion on the disagreement of the international community on its values with regard to war also Joshua Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial National Identity* (Springer, 2000) and Erin Creegan, 'Justified Uses of Force and the Crime of Aggression' (2012) 10 *Journal of International Criminal Justice* 59-82.
[435] Preamble UN Charter, Article 1(3) UN Charter.

interpretation, the crime of aggression definition thus moves the question of the aggressiveness of a particular use of force beyond the question of the (il)legality of force, with all its difficulties in and of itself,[436] to the question of the (il)legitimacy of illegal force, where there is *fundamental* disagreement on what is just and necessary.

The question of what a manifest violation of the UN Charter is, and its counter-question what an illegal but legitimate violation of the UN Charter is (and thus not a crime of aggression), leads back to the discussions about aggression that have paralyzed any legalistic attempt to construe abstract legal rules that govern the legality of the use of force which was observed in the previous chapter on 'use of force'-discourse: a fundamental disagreement on the aggressiveness or legitimacy of particular cases of use of force, and thus unbridgeable differences on how to formulate a concrete rule that distinguishes between aggression and non-aggression. Because any rule or criterion will be both over- and under-inclusive,[437] a determining rule between aggression and non-aggression will include some cases that weren't intended to be included and it will appear to leave out some other cases that would have been wanted to be included had this been known when the criteria were drafted.[438]

However, as was noted before, the consequences of the over- and under-inclusiveness for any regulation of aggression are that a state could be prohibited to use force when it is convinced that it should, or even has to, and that another could be allowed to use force even though its victim is convinced of the aggressiveness of the situation. The fundamentality of the state's right to resort to force and the intensity of the consequences at stake with aggression when the outcome of the rule seems unjust, make that states are not easily induced to compromise and accept to be bound by a rule that in the future may also work against them.[439]

The distinction between aggression and non-aggression and delegating the authority to determine over this to a supranational institution, thus goes to the very core of the state's sovereignty and decision-making power over its deployment of force in foreign and domestic policy. That states have been reluctant to give up this fundamental right to an outside, centralized body with hierarchical and authoritative power trumping state sovereignty, was demonstrated in the discussions on the creation of the United Nations in 1945, how the voting structure in the Security Council came about, the reluctance of the International Court of Justice or other international adjudication

[436] For example, the legality of self-defense against non-state actors, the limits of anticipatory self-defense, and the interpretation of UNSC authorizations.
[437] Frederick Schauer, *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press, 1991).
[438] Martti Koskenniemi, ''The Lady Doth Protest Too Much.' Kosovo, and the Turn to Ethics in International Law' (2002) 65 *The Modern Law Review* 159-175, at 167.
[439] See for this intensity argument, Hans Morgenthau, *Die Internationale Rechtspflege, Ihr Wesen Und Ihre Grenzen* (Noske, 1929), at 73-84. See for a similar argument also Martti Koskenniemi, 'A Trap to the Innocent…', in: Claus Kress & Stefan Barriga (eds.), *The Crime of Aggression – A Commentary* (Cambridge University Press, 2016 (forthcoming)).

mechanisms to use the term 'aggression,'[440] and the process of defining aggression for the purposes of the UN Charter and, later, the ICC Statute.

Where there is a willingness to resort to force, and thus the willingness to subject a state and people to bear the heavy costs and potential death and destruction of war, this is usually accompanied by a strong conviction of the justness and/or necessity of this force under the particular circumstance in the situation at hand. An abstract rule that would say otherwise can then only be deemed to be plain wrong. There is a clear consensus that not all uses of force are prohibited, as well as that not all illegal uses of force also comprise aggression. There appears to be a shared understanding that some use of force, even though illegal, can be justified or at least should not be condemned as aggression. But it is where to draw the line through this grey area where fundamental disagreement complicates matters. It is therefore the intensity of the consequences, which come with any such rule that is fundamentally disagreed with in its application to concrete cases, that makes the crafting of a binding rule that provides a clear division between aggressive and non-aggressive use of force a bridge too far for most involved.

The crime of aggression amendment and its 'manifest violation' criterion thus understood, moves the assessment of criminality from an *under*determined notion (whether the resort to force is legal or not based on the prohibition to use force as laid down in customary norms as well as the UN Charter) to an *in*determinate one, namely regarding its legitimacy, where there is *fundamental* disagreement on what is just and necessary. Broad standards such as 'proportionality' and 'necessity', referring to zones of discretion rather than limitation, make these assessments inherently complicated in a diverse and plural world.[441] The idea that there can be absolute rules to distinguish aggression from legitimate use of force in an objective manner unfortunately leads to false imaginations that we know and can know which violence is just and unjust, always and for everyone.[442]

To escape these discussions on the legitimacy of use of force, others disagreed with this interpretation of the 'manifest violation' threshold as coming down to an assessment of the legitimacy of use of force. Those upholding this 'manifest as excluding all that is contentious'-interpretation argued instead that 'manifest' excludes all situations in which discussion exists: which is then not *manifestly* aggressive. For instance, Harold Koh, on behalf of the US delegation, submitted during the Kampala negotiations:

[440] Aside from the post-WWII Nuremberg and Tokyo military tribunals, an international tribunal rarely determined that either party had committed aggression. Courts adjudicate whether or not the prohibition to use force, as provided by Article 2(4) UN Charter and customary international law, is violated and usually leave the question of the aggressiveness to the political realm of states and the Security Council.
[441] David Kennedy, *Of War and Law* (Princeton University Press, 2006), at 106.
[442] David Kennedy, *Of War and Law* (Princeton University Press, 2006), at 104.

> ‘If Article 8bis were to be adopted as a definition, understandings would need to make clear that those who undertake efforts to prevent war crimes, crimes against humanity or genocide – the very crimes that the Rome Statute is designed to deter – do not commit ‘manifest’ violations of the UN Charter within the meaning of Article 8bis. Regardless of how states may view the legality of such efforts, those who plan them are not committing the “crime of aggression” and should not run the risk of prosecution. At the same time, in order for an investigation or prosecution to proceed it must be shown that it was manifest that the action was not undertaken in self-defense, without the consent of the state in question, and without any authorization provided by the Security Council.’[443]

Those supporting this understanding of the ‘manifest violation’-criterion thus argued that the crime of aggression should not apply if there is an argument to be made of sufficient credibility that it is not manifestly unsound, that it is either self-defense, (implicitly) consented by the state involved, in pursuit of ‘any authorization’ by the Security Council, or following the broad outlines of a responsibility to protect. So the crime of aggression would not apply to the 1999 Kosovo intervention or if Syria would have been invaded absent a Security Council authorization (argued to be for protecting individuals against human rights violations); not for the 2003 US/UK intervention in Iraq (argued to be in self-defense and in authorized by old Security Council resolutions); not for the 2008 Russian annexation of South Ossetia and Abkhazia (argued to be protecting the human rights of Russian nationals after giving them Russian passports); and not for the US drone strikes in Waziristan or the Russian Crimea annexation (argued to be on invitation by the rightful government).

Interestingly, those submitting this argumentation thus asserted that the purpose of the crime of aggression was not to provide guidance into resolving competing claims of whether a particular use of force was aggressive or not, but merely to reiterate what was already a clear outcome from a political argumentative practice. Following this argumentation, law is regarded as expressing the outcome of this discursive process rather than mediating between opposing claims and guiding between right and wrong. They exclude arguably aggressive situations from consideration by a judge because a creative enough argument was found to claim against its aggressiveness.

To justify this exclusion, the earlier heard invocations of having faith in judges and the reasonabless of lawyers is sometimes invoked. For example, Kress, concluding that the legal argumentation for the Iraq war was unconvincing continued by submitting that

> ‘at the same time I do recognize the existence of an arguable case to the contrary, and it is the latter determination that should have been decisive had the issue arisen before an international criminal judge. Whether or not I am right in my

[443] Statement that US Delegate Harold Koh made in Kampala during the Rome Statute Review Conference in Kampala on 4 June 2010 (on file with author), at 4.

> legal evaluation of the 2003 Iraq war is not decisive for the sake of this comment, and I readily admit that an international judge may face a borderline case even when applying the requirement of a manifest violation of the United Nations Charter. My main point is that international legal method is advanced enough to enable reasonable lawyers to distinguish between a spurious attempt to justify an illegal use of force and an arguable case.'[444]

Kress invokes the disciplining power of law as enabling lawyers to be reasonable and distinguish between what should or should not come before a criminal court of law. As was seen in previous chapters, indeed, law's disciplining power excludes arguments that are not recognized as following the legal rationale, but at the same time includes those that do. It indeed makes that a use of force that is undertaken without any legally recognized justification (for instance a state that bombs an island claiming that he just felt like it and not invoking any credible legal argument) can be determined a 'manifest violation' and opens the door to a crime of aggression prosecution. Yet, at the same time, law's disciplining force makes that Russia's annexation of the Crimea in 2014 would be excluded just like the 2003 US/UK intervention in Iraq because there legal argumentation was invoked that is fundamentally disagreed upon, which is thus not a 'manifest violation.'

4.3.3 State Consent and the Opt-Out Option

The creation of consensus was the result of a careful compromise between including the above described threshold clause and basing the jurisdiction of the ICC on a consent-based scheme. When a situation is referred to the ICC by the Security Council, the ICC may exercise jurisdiction over state parties and non-state parties alike, in similar manner as for the other crimes under the ICC's jurisdiction, genocide, crimes against humanity and war crimes. However, unlike the other crimes, when the jurisdiction of the ICC is instead triggered by state referral or when the Prosecutor exercises its *proprio motu* powers, not only nationals (both perpetrators and victims) of non-state parties are excluded from jurisdiction, a (potentially aggressive) state party to the ICC can escape the jurisdiction of the ICC over aggression entirely by making use of the opt-out procedure provided by Article 15*bis*(4), as long as this state has done so prior to committing the allegedly aggressive acts.

This is an interesting characteristic of the crime of aggression, of course, because it provides for a criminal law provision which a subject to the court's jurisdiction can declare itself not bound by. It is an odd mixture of a vertically organized criminal law – between law enforcer and (alleged) criminal – and a decentralist and horizontally

[444] Claus Kress, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus' (2010) 20 *European Journal of International Law* 1129-1146, at 1142.

based international law, based on sovereign equality of states. This blending of legal regimes is further discussed in the next chapter. Nevertheless, it facilitated a compromise in Kampala: due to the opt-out possibility and the high threshold clause, states that previously were not open to anything but an exclusive Security Council filter saw that their concerns were no longer challenged, really, and thus opened up to compromise.

Even though the President of the ASP, Christian Wenaweser, pushed for this compromise in his President's Papers during the last days in Kampala, the state consent approach was not yet generally agreed on at the time of its presentation on the penultimate day of the Kampala Review Conference.[445] The delegation of Japan in particular criticized the use of an opt-out regime as conflicting with the entry-into-force procedure under Article 121(5), since this is already based on an opt-in approach and thus would contradict the use of an additional opt-out procedure in Article 15*bis*. Moreover, the African states parties, which were willing to accept a consent-based regime for the sake of consensual outcome, were of the view that it was too easy for states parties to opt out of the court's jurisdiction under draft article 15*bis* and requested that such declarations would expire after a certain time lapse.[446] In the end, however, they consented to the consent-based scheme without sunset clause.

4.3.4 The Role of the Security Council

Much of the discussions on criminalizing aggression for the purpose of the ICC surrounded the question on the role of the Security Council. The permanent members of the Security Council and a number of other countries were uncompromising in maintaining their position that the ICC would only be able to prosecute a case of aggression if the Security Council had previously determined the occurrence of an act of aggression. France, for instance, in its opening statement at the Kampala Review Conference, drew a line that it said that it would not cross concerning the requirement of the Security Council determination of aggression *before* the ICC could have jurisdiction over a situation of aggression: the exclusive Security Council filter.

This position was rejected by many other countries as flagrantly at odds with the independence of the ICC as a judicial institution and in violation of criminal law principles such as the presumption of innocence. Moreover, a number of states[447] demanded the consent of the aggressor state to trigger jurisdiction, whereas mainly African, Latin American and Caribbean states disagreed with this requirement. At a certain point in the negotiations, it was agreed that if the crime of aggression would be

[445] Stefan Barriga, 'Negotiating the Amendments on the Crime of Aggression', in Kress (ed.), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), 3-57, at 53
[446] Stefan Barriga, 'Negotiating the Amendments on the Crime of Aggression', in Kress (ed.), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), 3-57, at 53
[447] Particularly the European states with the exception of Switzerland and Greece.

adjudicated at the ICC, 'the rights of the defendant as foreseen in the Statute must be safeguarded under all circumstances including in connection with prior determination by a body other than the Court.'[448] This led to a strong majority of delegations that asserted that this implied that a determination by the Security Council or another organ could not legally bind the Court, though it would make a strong argument for its existence.[449] Because the discussions were thus placed into the frame of criminal law, the crime of aggression thus needed to be discussed on the terms of the criminal law paradigm, including respecting due process and rights of the defendant. This enabled the discussion on the role of the Security Council to move and specify to the remaining question of whether or not the Security Council should be the exclusive jurisdictional filter at the stage of the proceedings where the Prosecutor has concluded the preliminary analysis and intends to open a formal investigation.[450]

But by that time, developments on other aspects of the crime of aggression had evolved so much into the direction of those demanding an exclusive Security Council filter, that compromising on this aspect would in fact no longer be a real compromise. Now that the consent-based regime, the opt-out-option, the high threshold requirement of 'manifest violation' and the stringent leadership requirement (see below) in effect excluded all situations that were feared by those that demanded the exclusivity of the role of the Security Council, the road was paved towards consensus.

4.3.5 The Leadership Requirement

But not before it was specified which individuals, exactly, would be vulnerable to prosecution under this scheme. The inability to come to a provision in which the crime of aggression would actually address situations in which there exists contention was again reflected in the way that the leadership clause was included. The leadership clause provides that a perpetrator of the crime of aggression may only be 'a person in a position effectively to exercise control over or to direct the political or military action of a State.'[451] Only few questioned the wording of this 'control or direct'-clause during the discussions in the Special Working Group, even though it is arguable at best whether this will include those individuals that in contemporary days provide serious threats to international peace and security, such as industrialists and

[448] Stefan Barriga, 'Negotiating the Amendments on the Crime of Aggression', in Kress (ed.), *The Traveaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), 3-57, at 30
[449] Stefan Barriga, 'Negotiating the Amendments on the Crime of Aggression', in Kress (ed.), *The Traveaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), 3-57, at 30
[450] Stefan Barriga, 'Negotiating the Amendments on the Crime of Aggression', in Kress (ed.), *The Traveaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), 3-57, at 33
[451] Article 8bis(2).

multinational corporate leaders that shape and influence state action and armed non-state actors like terrorists or violent subversive groups.[452]

Even though this 'control or direct'-standard was presented as a codification of the Nuremberg and Tokyo tribunals, these tribunals actually assumed that aggression could be committed by private economic actors (such as industrialists) and third-state political and military leaders complicit in the aggression, which is difficult to satisfy the 'control or direct'-requirement.[453] Moreover, both the Nuremberg and Tokyo tribunals specifically rejected the 'control or direct'-requirement in favor of the 'shape or influence'-standard.[454] Heller shows that the relevant jurisprudence of the Nuremberg tribunals establishes three basic principles: i) non-governmental actors can commit the crime of aggression; ii) aggression is a policy-level crime; and iii) an individual is at the policy level if he is in a position to 'shape or influence' a state's political or military action.[455] The crime of aggression's 'control or direct'-requirement thereby deviates from these precedents in favor of limiting the crime of aggression to the very few individuals that are governmental actors, of the aggressive state itself, and that are in a position to control or direct this aggressive state's political or military action. It thereby immunizes third party officials as well as non-governmental actors, including powerful corporate actors, despite their potential significant influence on states' use of force.

Furthermore, Mark Drumbl argued that this limitation may well hurt the effectiveness and legitimacy of international criminal justice. By restricting and excluding cases of those that matter greatly to afflicted local populations, the *meso*-narratives of aggressive war remain untold and thus disappear from the history-telling and expressive effects of the justice project.[456]

Yet, as Barriga describes: 'Given that the wording of the clause already enjoyed widespread support, however, there was limited interest in exploring alternative formulations.'[457]

---

[452] Mark Drumbl, for example, argues for the importance of including also non-leaders into the accountability conversation about aggressive wars, in Mark A. Drumbl, 'The Push to Criminalize Aggression: Something Lost Amid the Gains?' (2009) 41 *Case Western Reserve Journal of International Law* 291-319.

[453] See for a further expose of this argument, Kevin Jon Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression' (2007) 18 *European Journal of International Law* 477-497.

[454] Kevin Jon Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression' (2007) 18 *European Journal of International Law* 477-497, at 480.

[455] Kevin Jon Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression' (2007) 18 *European Journal of International Law* 477-497.

[456] Mark A. Drumbl, "Germans Are the Lords and Poles Are the Servants': The Trial of Arthur Greiser in Poland, 1946' (2013) *Washington & Lee Legal Studies Paper No. 2011-20* , available at SSRN:http://ssrn.com/abstract=1941801.

[457] Stefan Barriga, 'Negotiating the Amendments on the Crime of Aggression', in Kress (ed.), *The Traveaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), 3-57, at 22

4.3.6 Compromise Reached

Pragmatic outcomes were sought that escaped the aspects where disagreements persisted, and where they were fundamental and unbridgeable, such as on the actors involved, on humanitarian intervention, and on preventive use of force in the war on terror. Barriga explains: 'What can safely be said […] is that there was the widespread concern that it would be inappropriate to deal with key issues of current international security law in the haste of the final hours of diplomatic negotiations.'[458]

This is striking to say the least. The crime of aggression lies at the core of the international security law, and distinguishes between what is deemed criminal about it and not, which perhaps even to the contrary might be perceived as heroic. It goes *exactly* to the core of these key issues that were circumvented. Moreover, one can wonder about the extent to which the crime of aggression, as thus constructed, is capable of capturing modern forms of aggression, such as when carried out by non-state actors in asymmetric conflicts.[459]

Drumbl posited that the narrow framing of the crime of aggression keeps threats such as internal armed conflict, attacks by states against their own populations, systematic attacks by narco-terrorist syndicates or other types of terrorist attacks, massive cyber-attacks or widespread, long-term, severe and deliberately inflicted environmental harms, off the discussion table *despite* the fact that each of them could well cause the kinds of *effects* normally associated with war among states.[460] He argues that if the purpose of the criminalization of aggression is to protect security, stability, sovereignty and human rights interests, narrowing the conversation by focusing only on the core prohibitions that emerged six decades ago leaves a significant array of serious threats outside the framework of international criminal law.[461] Criminalizing only interstate attacks that flagrantly violate the *ius ad bellum* does not capture the key stability, security, human rights and sovereignty challenges that the international community faces. In similar vein, Ambos wrote that since the definition of aggression turns out to be exclusively state centric, it will be unable to capture modern forms of aggression carried out by non-state actors in asymmetric conflicts.[462] It excludes terrorist attacks. It excludes force used on foreign territory against such terrorist attacks, that meanwhile destroy the livelihood of innocent civilians that had nothing to do with, nor any power to prevent, the activities of those non-state actors. It excludes industrialists and businessmen that influence or even pull the strings in the foreign

[458] Stefan Barriga, 'Negotiating the Amendments on the Crime of Aggression', in Kress (ed.), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), 3-57, at 95
[459] Kai Ambos, 'The Crime of Aggression after Kampala', in *German Yearbook of International Law* (Duncker & Humblot, 2010), vol. 53, 463-511, at 488.
[460] Mark A. Drumbl, 'The Push to Criminalize Aggression: Something Lost Amid the Gains?' (2009) 41 *Case Western Reserve Journal of International Law* 291-319.
[461] Mark A. Drumbl, 'The Push to Criminalize Aggression: Something Lost Amid the Gains?' (2009) 41 *Case Western Reserve Journal of International Law* 291-319, at 310.
[462] Kai Ambos, 'The Crime of Aggression after Kampala', in *German Yearbook of International Law* (Duncker & Humblot, 2010), vol. 53, 463-511, at 488.

policy agendas. Thus, Article 25(3)*bis* and Article 8*bis*(1), by limiting the application of the crime of aggression exclusively to states and *intranei*, creates impunity for *extranei*.[463]

Since resolving such fundamental issues were beyond the realm of possibilities as this lengthy regulation and criminalization process demonstrated, agreement was instead sought in alternative terminology, circumventing disagreement, and instead agreeing on restrictive provisions, abstractions and vague language, delegating the eventual resolution between opposing claims elsewhere, to the discursive space where law is (re)constructed and (re)constituted, and ultimately, on the table of a judge, if it ever gets to that.

And so, the crime of aggression was created. Depending on how to interpret the 'manifest'-criterion, the crime of aggression either delegates the fundamentally disagreed upon question of the legitimacy of use of force to judges to resolve, or it restricts the scope of the crime of aggression to a very narrow category of situations. An approach was taken to keep the provision vague or restricted rather than explore the circumstances where armed force in fact threatens international peace and security. Those situations that are most disagreed in contemporary 'use-of-force'-discourse also are those situations for which often appeals are made to the law to provide guidance. But for those situations, agreement was not likely to be possible. Consequently, it is either up to an inherently political and moral assessment on the legitimacy of force, or, if instead the strict interpretation of the manifest violation is followed, the crime of aggression provision is so restricted that it doesn't seem to add much to what was already obvious and for which no new judicial or enforcement mechanism was necessary. It then does not apply to any force that can be argued to be lawful or legitimate because it is then not 'manifest;' it does not apply to any person that is outside the very upper layer of governmental leadership of a state; nor does it apply to states that choose to opt out of the criminal jurisdiction of aggression; or to those in power at the Security Council.

4.4 Paradoxical Turns to and from Legalism in Search for the Crime of Aggression

The regulation and criminalization of the notion of aggression follows a logic of suspending politics through legalism, attempting to subdue the arbitrariness and dangers of states resorting to war by turning to the legal language. To limit and manage the risk of war, a turn to law seems appealing. Despite the challenges that are brought by disagreeing how exactly to define aggression, modern history preferred a

[463] Kai Ambos, 'The Crime of Aggression after Kampala', in *German Yearbook of International Law* (Duncker & Humblot, 2010), vol. 53, 463-511, at 489-491. See also Mark A. Drumbl, "Germans Are the Lords and Poles Are the Servants': The Trial of Arthur Greiser in Poland, 1946' (2013) *Washington & Lee Legal Studies Paper No. 2011-20* , available at SSRN:http://ssrn.com/abstract=1941801.

more legalistic and criminal law approach to bring the notion of aggression within the realm of law than had been possible before. This spurred the regulation and criminalization project, from Versailles to Kampala. Consequently, the idea of a right to go to war changed to the understanding that this same behavior became an *actus reus* for which statesmen can be prosecuted; behavior that became criminal and was referred to as the supreme international crime,[464] and is now included into the ICC Statute as one of 'the most serious crimes of concern to the international community as a whole.'[465]

In the process, law's disciplining force had the consequence that debates on using force are now held in the legal language, following the legal logic, and excluding arguments that are not recognized in law, such as moralism without any reference to a legal source, including those that are, as was observed in the previous chapter. The legal language thereby limits the possibilities of argumentation on the lawfulness of force to some extent, and, particularly through the criminal legal language, moralizes the assessment of aggression. However, the regulation and criminalization of aggression process also demonstrates how substantive disagreement on what exactly separates aggressive from non-aggressive use of force maintains. It shows that the attempt to capture the world of politics in law cannot suppress the politics and replace it with neutral, objective and abstract rules that lead to just outcomes. To diminish the risk of unfair and arbitrary decisions by the executive, by powerful states, legalism is a tempting road to take. But where fundamental disagreement prevails, all law can do is i) exclude what at least all *can* agree on, ii) create procedural and institutional arrangements to sort substantive disagreement out elsewhere, and iii) mask fundamental disagreement on world order with the presumption of legal clarity that the legal language brings. Yet, it also iv) disciplines the debate into the legal logic and thus includes and excludes what might not always was intended to be in- and excluded, v) create new possible positions by proceduralizing the notion and thereby creating new rules for the game that each holds their own performative capacity, and vi) entrenches contestation by enforcing opposing positions with the force of law and morality claim that international criminal law brings.

Both in the UN Charter as in the Charters of the Nuremberg and Tokyo Tribunals, a definition of this crime was left outside of the constituting documents. And the Tribunals themselves did not attempt any defining exercise either. Again and again, the parties involved could not agree on how to define it and whether a definition was needed at all. And in the subsequent processes of regulating and criminalizing aggression towards the 1974 and 2010 outcome documents open and restrictive language was used to steer away from where disagreement could not be overcome. Achieving consensus in these 20th and early 21st century processes, was possible by including provisions in the definition that recognized the inherent political nature of

[464] International Military Tribunal, *United States of America et al. v. Goering et al.*, Judgment (1946), 41 *Am J. Int'l L.* (1947) 172, at 186.
[465] Preamble, Rome Statute.

this distinction, even though veiled by legal language. In the 1974 UN General Assembly definition of aggression this entailed a significant role for the Security Council to determine the legitimacy of the use of force. Specifically, this was arranged in its Articles 2 and 4. The Resolution provides a general definition of aggression in Article 1:

> 'Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.'

This is followed by a list of examples of acts that could qualify as acts of aggression. But then, in Article 4, the resolution provides that '[t]he acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.' And in Article 2, the resolution provides that in any case, the Security Council may 'conclude that a determination that an act of aggression has been committed would not be justified in light of other relevant circumstances (…).'[466]

The Resolution thereby provides little legal guidance on what exactly is the distinguishing rule between aggression and non-aggression other than pointing in an obvious direction (use of armed force) and further leaving it up to the political decision-making process through the Security Council, to determine in a specific case.

Likewise, in the 2010 crime of aggression amendment to the ICC Statute, depending on which interpretation of 'manifest' is followed, the disagreement over where the dividing line between aggression and non-aggression lies either was masked by including a provision that makes the distinction ultimately rely on the *legitimacy* of use of force rather than aligning the distinction aggression/non-aggression with that of legal and illegal use of force. Aggression is illegal use of force that is also illegitimate, the discourse seems to show. However, what illegal but legitimate or illegal and illegitimate (and thus aggression) provides in terms of particular uses of force is fundamentally disagreed upon. Alternatively, the 'manifest violation'-criterion is to be read to exclude all that is contentious about the legitimacy of force entirely, leaving the very narrow scope of the crime of aggression to include those uses of force that cannot at all be argued in legal terms to be for humanitarian, defensive, just or necessary purposes. As was seen in the previous chapter, there is a wide discursive space of argumentative strategies for such claims in the contemporary 'use-of-force'-discourse.

The many debates in the many (special) working groups and commissions that were created to define aggression in the post-WWII constellation demonstrated that finding agreement on clear substantive legal rules appeared not possible. Success, in the form of an outcome document, was only possible by hiding disagreements behind vague

[466] *Definition of Aggression*, UNGA Res 3314 (XXIX) (14 December 1974).

language, leaving the eventual decision between aggression and non-aggression to be decided upon elsewhere than at the diplomats' table. The search for legalistic drafting thereby led to a recognition of the need to return to the abstract, the general, where all can agree to the much simpler mantra that aggressive war is undesirable and should be suppressed as much as possible. It led to the inclusion of open norms, deferring the decision to judges and public opinion. Therefore, whereas the *process* of regulating and criminalizing aggression can be seen in terms of this turn and reaching out to law and legalism, the *product* of it, i.e. leaving the ultimate decision to the Security Council in the 1974 definition and relying on an assessment of the legitimacy of war in the Rome Statute's crime of aggression, paradoxically reflects a turn away from legalism.

It follows that the 'law *versus* politics'-dichotomy, between the logic of 'law trumping politics' and 'talking reality to lawyers' cannot be but false. Neither can explain the century long efforts to regulate and criminalize aggression. If law would be able to trump politics, a century long process in which the smartest lawyers and diplomats tried to create a law to address aggression would have gotten further than the rather open as well as limited result that was achieved. And the idea that law would be nothing but political can't explain why despite continued and fundamental substantive disagreement, the legalist efforts continued nevertheless and the adoption of the amendment was celebrated as a historic achievement. What this process brought is that on the one hand, this regulation or legalization provides that the scope of what can be argued to be acceptable is to certain extent disciplined by the force that law brings, but on the other, the process demonstrates law's limitedness in overcoming fundamental disagreement in and of itself. The relationship between law and politics is thus more complex than counter-posing law and politics in the way of looking which is stronger than the other. Instead, both logics partly explain how law and politics interact in the efforts to manage and diminish risks in our society, such as in trying to manage and diminish the risk of aggressive use of force. A perfect solution will never be found; humanity is too diverse and society too complex for such utopian thinking. Law never brings solutions like that. Instead, it is an instrument with which society aims with continuous effort to order itself and strive after as much as possible justice, through a continuous reconstituting and reconstructing of law. Moreover, the interaction of these two logics demonstrate the repetitive dynamic that the search for legalism stumbles on fundamental substantive disagreement where notions are indeterminate and then turns to delegating the substantive question elsewhere, through proceduralization and institutionalization. And in this proceduralization, new rules of the game are created, which creates new positions, each holding performative power by themselves, which continues the dynamic in an ever repeating spiral.

The notion of aggression reflects one of the most complicated subjects in human interaction. The intensity of the reasons for wishing to resort to force involved and the devastation of the consequences of using force make this aspect of global interaction particularly challenging for international relations. Consequently, it makes for a

particularly challenging legal construct. Where this chapter focused on understanding how states have attempted to seek agreement, to maintain their positions, and arrive at agreed upon procedures and institutionalization for dealing with aggression, the next chapter takes a different angle. It discusses the crime of aggression by deconstructing the amendment to the legal frameworks that it borrows from, and discusses the conceptual blend that comes from this legal construct.

5. FUSING LEGAL FRAMEWORKS IN CRIMINALIZING AGGRESSION

The previous chapters focused on how use of force discourse and state practice as well as the diplomatic negotiating practice give form and shape to the construction of international criminal law. These practices draw axioms from and combine elements of different bodies of law to address the multiple challenges that the project of creating a global justice system faces and fulfill the multiple purposes it strives for. For example, it needs to function in an interstate system based on state consent, respect fundamental human rights, resist becoming (too) authoritarian as well as (too) utilitarian, create accountability mechanisms that can handle the complexities associated with atrocity crimes that cause domestic systems to fail prosecuting themselves, and contribute to seeking justice in a world where justice means different things for different people, and all that in tense and fragile post-conflict situations. It is thus no surprise that this undertaking faces its challenges. It faces not only those that any domestic society faces in administering criminal justice, such as the need to balance the often contradicting aims of retribution and rehabilitation, the difficulty of striving for justice, the difficulty of seeking legitimacy in the society it functions in for decisions that are not always easily understood, and, importantly, function in a society that includes fundamentally different viewpoints of what justice is. International criminal justice faces all those challenges but also needs to address a whole additional array of complexities that the transnational space brings.

This chapter takes a closer look at the normative foundations of the crime of aggression amendment. It discusses that as a result of the interplay of law and politics, the outcome document that could be agreed on despite fundamental substantive disagreement on what aggression is, blends different legal frameworks. In particular, the crime of aggression borrows from the legal frameworks of public international law, criminal law and human rights law, each with their own rationales and purposes. The first section discusses how the interplay of law and politics led to a fusion of legal frameworks. The second section considers each of these legal frameworks and demonstrates how each in themselves represents political struggle. The final section scrutinizes the crime of aggression into the elements from different legal frameworks and discusses the blending of these frameworks, each bringing contestation by themselves, and together making for a rather swampy surface to base a criminal legal norm on that is to be adjudicated in a court of law.

5.1 The Law and Politics of Blending Legal Frameworks

In his *Identity Crisis of International Criminal Law* article, Darryl Robinson demonstrates that by drawing on national criminal law and international human rights

law, international criminal law absorbs contradictory assumptions and methods of reasoning. As a consequence, the international criminal law system paradoxically endorses illiberal doctrines that contradict its fundamental principles.[467] Robinson shows how international criminal law practitioners tend to strive after maximizing the protection of victims in order to vindicate their rights, which culminates in punishing individuals without fair warning, culpability or fair labeling. According to Robinson, 'human rights liberalism produces a criminal law system that is increasingly authoritarian in its disregard for constraining principles;' a system that sacrifices fundamental rights of the accused in favor of increasing the conviction rate.[468] Robinson builds on the work of Danner and Martinez, who demonstrated that the interaction of human rights law, domestic criminal law and the transitional justice framework creates conflicts in the international criminal law framework by focusing on the context of the joint criminal enterprise doctrine.[469]

In similar manner, the crime of aggression fuses together precepts of public international law, (domestic systems-based principles of) criminal law, and human rights law. These legal frameworks each have their own rationales and principles. Yet they are combined to reach agreement on the crime of aggression amendment. First, public international law is based on consent as legitimizing concept. It is primarily aimed at managing international relations, peace and security, and stability. It thereby seeks to manage horizontal relations between formally equal sovereign states. When deploying legal responsibility mechanisms, it does this (primarily and predominantly) in light of these rationales as a horizontally based dispute settlement mechanism, between equal parties. To the contrary, criminal law is an inherently vertical instrument that serves the exercise of authoritative state power over individuals in a top-down manner, seeking individual accountability on behalf of society for acts committed by individuals, knowingly and willingly. Criminal law is individualizing and exerts power and authority. Third, human rights law also individualizes and embodies a vertical rationale, but contrary to the primary rationale of criminal law, human rights law seeks to protect the individual from the exercise of state power, and thus protects the individual against the state rather than the other way around. Whereas horizontality is associated with sovereignty, equality, decentralization and voluntarism, verticality represents superiority, in the sense of superseding sovereignty, authority, centralization, subordination as well as the image of the suppressed against the powerful, and inherent inequality, of position as well as means. Whilst conceptually contradictory, interestingly, the crime of aggression brings them together, in a concoction of different legal frameworks, and, consequently, of the different assumptions and rationales that they come with.

---

[467] Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 925-963.
[468] Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 925-963, at 931.
[469] Allison Marston Danner & Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 *California Law Review* 75-169.

Already from the early days of the crime of aggression's existence, the blending of different ideas about what the crime of aggression was supposed to do, can be identified. And as this chapter demonstrates, these different ideas connect to the different rationales of the legal frameworks from which the crime of aggression amendment has borrowed.

As discussed in the previous chapter, the first prosecutions for the crime of aggression took place at the Nuremberg Tribunal, which was created during the London Conference in 1945. The discussions among the four victorious powers from the Second World War are illustrative. British Sir David Maxwell Fyfe was concerned for the crime of aggression's ability to function properly without opening too many exceptions through which too many aggressive actions could escape the provision's scope. He argued that hence a clear definition was needed to close down argumentative strategies. He reasoned from the perspective of how the norm could function to hold individuals accountable, which can be understood as a criminal law perspective, trying to create a norm that functions properly in a criminal court of law and that would provide guidance to the judges on what does and does not fall within the scope of the crime.

Where the focus represented by the UK lay on the value of the norm as criminal law instrument to hold offenders accountable (from society to individual in a top-down manner), US Justice Robert Jackson represented a view that leaned somewhat more towards the human rights rationale. He asserted that without specific elements and a clear definition, a defendant should and would have the right to argue that his war was not aggressive. In order to enhance not only the instrumental value but also preserve criminal law's due process and fair trial protections for the defendant (human rights), aggression would need to be defined clearly so that the legality principle could be upheld whilst enabling prosecutions of those committing aggression. Jackson's argument thereby lay on that of the individual vis-à-vis society, in a bottom-up manner. His focus was close to that of Fyfe, yet added or emphasized the importance of upholding the legality principle, not only for the rights of these Nazi leaders, but also (and probably mostly) because he understood that only then the trial would be regarded to have been conducted fairly and gain legitimacy.

The paradox of these two positions is that if a trial is held and it provides space to the accused's narrative, the political project behind the trial may be hurt by allowing the story the trial is set out to tell to be contested. Yet, if the accused is not given the space to contest the version of the truth that the prosecution and the system behind the trial presents, the trial is nothing more than a 'show trial.'[470] This issue is further developed in the next chapter.

[470] For a discussion of this paradox, see the end of the lecture 'International Justice: Between Impunity and Showtrials,' lecture by Martti Koskenniemi on 4 January 2013 at SOAS, University of London, available at https://www.youtube.com/watch?v=2QTBdPyQtEw, at 14:50.

Even though the formal position of the UK in setting up the Nuremberg tribunal became one that supported the project and sought for the crime of aggression to function as a proper criminal law provision, Winston Churchill had at first also rejected the idea of trials after the Second World War, and instead favored a firing squad for the Nazi leaders.

This was also the angle chosen by the Soviet Union , represented by General Nikitchenko. He posited the importance of getting an expedient and effective closure to the war, in the sense of a settling of the bill, so to speak. The Nazi's had lost and thus had to pay for it with the lives of their leaders. There was no need for criminal law in the sense of creating a cosmopolitan project of global justice because, pointing to the failure of the creators of the UN to define aggression, he said that apparently there was no agreement on this topic. The Soviet Union therefore followed a more pragmatic rationale of wanting to abstain from creating international law for the future and to merely deal with the current situation, where it was clear that the Nazi leaders would face execution, fair trial or no trial at all. The human rights rationale of rights to the defendant and the criminal law rationale as societal instrument to inflict punishment were accepted (or condoned) as long as they would not stand in the way of what needed to be done in terms of execution, and as long as they would not create precedent for the future. Instead, the Soviet Union sought to apply the legal instrument of a tribunal to manage and rebalance the international relations between the victorious and defeated states, as well as setting a clear record of the war's outcome for the rest of the world and future generations. It thereby adopted an approach similar to that of public international law: managing international relations and reflecting the (new) *status quo* of power positions.

Lastly, the French position deviated from all these three rationales because, as Professor André Gros expressed, they did not believe that, at that time, launching an aggressive war could be considered a crime and rejected the idea that international law could play such an expansive role, particularly when it concerned criminal law and its prohibition of retrospective application. Eventually, the parties to the London Conference could not agree on whether or not to include a definition of aggression. They compromised in the end that no definition of aggression was included, but that the judges would be referred to the treaties on aggression that did exist, which renounced aggression yet left it undefined.[471]

In Kampala, similar different points of departure reappeared on the purpose of the crime of aggression and consequently, how to construct the norm. Although by now the idea that launching an aggressive war amounts to an international crime had been accepted broadly. Moreover, the view previously expressed by the Soviet Union to merely hold a 'show trial' to replace summary executions had also ceased to be

[471] Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace, Vol. 1* (Oceana Publications Inc., 1975), at 394-396.

voiced expressly in the international sphere. However, what aggression actually is, remained virtually as open as it was back in 1945 and 1974.

An illustration of how these different points of departure appeared in Kampala is provided by the composition of the state delegations that negotiated the crime of aggression amendment. Most delegations included lawyers from the justice department, which was a mix of both criminal lawyers and public international lawyers or exclusively one or the other, diplomats from the foreign affairs department, a rare representative of a defense department, and supplemented by academics from mostly the international criminal law field. In general, the criminal lawyers were mostly concerned with legalist and system thinking that would enable a legally functioning provision that would safeguard fair trial rights and the independence of the ICC; the public international lawyers had particular notice of the importance to states of the principle of consent and were concerned with limiting the ability of the ICC to exercise jurisdiction over just any situation and anyone, hoping to thereby enable more states to join the ICC and the crime of aggression project; and the diplomats, above all, sought compromise, wherever it could be found, and furthermore joined the public international law lawyers in protecting state sovereignty. During break time, jokes, sometimes containing some levels of frustration, were expressed on the miscomprehension of the other 'blood groups:' the misunderstanding of the public international lawyers of the crime of aggression and ICC's nature as *criminal* law and the danger of their willingness to sacrifice fundamental underpinnings of criminal law like the legality principle; the misunderstanding of criminal lawyers that there would never be a crime of aggression amendment with an ICC that would be authorized and empowered to judge over the world's most contested issue of the legality and legitimacy of war; and the misunderstanding of the diplomats that this was not just something to get a compromise on, because fundamental issues were at stake. In Kampala, legal frameworks were brought together and its logical consequence was contestation: between the rationales, purposes, fundamental principles, and assumptions associated with each legal framework, between the agents that represent such frameworks, as well as within each legal framework itself.

Such contestation not only exists between legal frameworks; every legal framework represents a political struggle in itself as well. The provisions that it contains are a result of contestation over the behavior it tries to regulate and the ways in which such regulation should occur. It is about authority, about who or what body is empowered to make decisions when a case is not clear-cut, and which of the underlying assumptions about society, order, justice, humanity, or what may, wins over its opposition. Because such fundamental contestation is usually impossible to resolve, the interpretive communities that affect the construction of any particular legal framework often try to find common ground on language rather than substance. Discussions turn from fundamental ideals about the world and all that is in it, to semantics.

When various legal frameworks are joined together, this same dynamic occurs but then in manifold. This dynamic transpired in the construction of the Nuremberg and Tokyo Tribunals and in the pleadings and judgments of those tribunals and it re-emerged in the discussions on the crime of aggression's inclusion in the ICC Statute. Kampala became another space of contestation where substantive disagreement on fundamentally differing underlying assumptions was circumvented in favor of reaching a compromise on language, on a textual provision. A provision that is sufficiently open to allow fundamentally opposed assumptions to find their place, to allow fundamentally opposed ideas of what use of force is aggression to maintain their interpretation and argumentation, and thus a provision that allows A and non-A.

Yet, the celebration of this as a milestone was not wholly without merit. Firstly, it was a rather impressive diplomatic achievement to come to a consensus after the first days of the Review Conference had shown a permanent member of the Security Council, France, to draw a line in the sand where it concerned the exclusive authority of the Security Council over determining aggression, and smaller states fortifying behind diametrically opposed statements that the ICC should be absolutely independent. Secondly, and more fundamentally, as was observed in the previous chapters, the idea that because fundamental disagreement has not been overcome and no substantive agreement has been reached nothing notable would have been achieved on disciplining the notion of aggression is too short-sighted as well. There is a reason that all those stakeholders were willing to come to a consensus on an open provision that allows A and non-A. They believe that having such a provision, however flawed or limited in operative value perhaps, still has more disciplining power than no provision at all.

Such disciplining power is seen in its inclusionary power, namely that aggression as norm is inclusive and generalized: it applies to all, even if no institution can exercise jurisdiction over aggression in every situation. It is believed that the norm as such is reiterated and pronounced against norm-breakers and thus holds disciplining power as such against those that violate or consider violating the norm.

Moreover, such disciplining power is also seen in the norm's exclusionary power. By having at least some legal wording for the norm on aggression, it may be used against those situations and argumentations that fall beyond what all *can* agree on constitutes aggression. To the very least, those situations are now included in the international criminal law norm and denounced as violating the highest values of humanity. And arguments that are not based on law but instead based on political interests or morality, or what may, to claim the non-aggressiveness of force are dismissed as non-legal and thus not able to justify the use of force as non-aggression.

What Kampala demonstrated was that in order to gain law's disciplining power for the purpose of limiting aggressive war, stakeholders have been willing to overstep the reality that substantive agreement on an essentially contested concept like the notion of aggression could not fully be achieved. A way to gain at least a minimum amount

of law's power nevertheless was found in the creation of procedures: by finding agreement on procedural rules, on *how to deal* with it rather than *dealing* with it, and by creating or enabling an institutional framework to that purpose, so that the actual resolution of the substantive disagreement would be delegated. The question whether it is likely that such an institutional framework would be able to do what has remained impossible so far (find substantive resolution on what aggression is) is set aside in favor of enabling law's disciplining force to the extent that is possible. In order to create consensus on procedural rules, however, contradicting aims, rationales and principles that were attached to what the norm on aggression should be, needed to be conjoined in one provision: the crime of aggression.

5.2 Contestation Within and Between Legal Frameworks Surrounding the Crime of Aggression

What contestation takes place within the legal frameworks that the crime of aggression borrows from (public international law, criminal law and human rights law) and how do these legal frameworks, each with their own rationales, purposes and principles, come together in the crime of aggression?

Before it became conceptualized as a matter of international criminal law and as human rights violation, the issue of war and peace was regarded predominantly as a matter of diplomacy and international relations. In the past 100 to 150 years, this area became increasingly legalized by the emerging field of public international law. The legal framework that we now understand as public international law emerged incrementally from an increasing management of external relations between entities (communities, empires, monarchies, states) that led to bilateral and multilateral agreements to address threats from beyond one's borders and to enhance interaction and cooperation on, particularly, trade and finances.

This development of public international law was incited by two contradicting traditions or understandings of what this 'law' was and would be. On the one hand it is seen as a reflection of a collective (albeit European) conscience and morality.[472] In that vein, it is seen as a 'natural law,' of which the source could never be something as arbitrary as a state's will, but instead found its authority in nature, in an understanding of morality as an objective and universal source of knowledge, or in semi-sociological observations about 'European culture' which would reflect what liberal reform agenda

[472] See for a discussion on those that held this idea of law as a reflection of aa collective conscience, Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), at Chapter 1, and specifically at 48-49. Bluntschli, for example, understood international law as an ongoing dynamic and developing process of translating 'the legal conscience of the world' into laws, quoted in Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), at 42-47.

legislators should take.[473] It is in this sense that international law's idealist aspirations to embody, reflect and enforce a collective conscience can be understood.

On the other hand, however, international law is also characterized by being contingent on state will, expressed through consent. In this sense, the body of law that is formed through this accumulation of agreements and ideas is characterized by its decentralized nature and lack of central authoritative power. In principle, public international law leaves matters of application and interpretation with the states themselves, unless they consent to delegating such questions to an adjudicatory mechanism, such as the International Court of Justice. Importantly, jurisdiction of any such mechanism is again *consent*-based. Yet, a legal order contingent on consent is a paradoxical idea. If law is equated with state will, which is expressed through state consent, then law would change whenever states change their will. However, viewing law as holding any normative force and therefore less arbitrary than if it would be equated one-on-one with state will requires a decision when and how consent can be overruled: when and how a state can be hold to account in legal terms when it no so wills. Such decision needs to depend on something other than state will and thus shows how a legal order cannot be understood as being purely consent-based.[474]

Public international law thus combines universalist aspirations with particularist normative arrangements. The reason for this lies in the realization that despite ideals and aspirations, substantive agreement on what this meant in terms of where to draw lines between what would and would not be allowed was inherently complex on topics that were essentially contested. Because law inherently generalizes (it is applicable to all including oneself) it faced the practical problem of how to accept a central authority that would decide over essentially contested issues. Inviting external scrutiny over issues that were fundamentally disagreed upon was not found appealing, and thus the principle of consent was a way out to settle the matter without barring the creation of any text at all. Those that could agree did so, and those that could not agree refrained from joining the particular treaty or institution, or only joined to the

[473] In the Gentle Civilizer, Koskenniemi describes how the founders of the *Revue de droit international et de législation comparée*, the first international law journal, which was published in 1868, studied law by way of studying the 'the legal conscience of the civilized world' through a re-imagination of the man of legal science as the representative of humanity's conscience. They regarded humanity's conscience as the proper object of study to inform and support legislators in Europe for liberal legislative reform. Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), see in particular, Chapter 1: 'The legal conscience of the civilized world'.

[474] See for a discussion on the consensualism of international law in particular Chapter 5 in Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, 2005). See also Wouter Werner, 'State Consent as Foundational Myth' (forthcoming and on file with author). In this article, Werner argues that state consent is part of a foundational myth of international law that presents international law as more coherent, unitary and encompassing than it actually is. He asserts that '[w]hile it is indeed impossible to make sense of contemporary international law absent the notion of law-making; and impossible to make sense of law-making *without* using the notion of state consent, grounding the international legal order as a whole on the consent of states is only possible if one accepts the paradoxes and blind spots that come with it.'

extent that they did agree through reservations on specific provisions. The idea of supra-state authority was thus eliminated whilst still being able to use the force of law to agree on principles and legal norms where agreement could be reached, even if only truly on semantics rather than entirely on substance. Like in any legal field, contestation on substance thus led to discussions on semantics. And agreement could be found on proceduralization and institutionalization, on creating legal boundaries to shield off what could be agreed on, whilst leaving the norm open where contestation was fundamental, and create an institutional or procedural setting to circumvent the openness of the norm for resolution elsewhere, in a court setting, advisory committee, states themselves, public debate, or whatever could be agreed on. But off the diplomats' table. Both law's openness due to fundamental disagreement on substance and the reaching out for law for its disciplinary power therefore emerge throughout the international law field, as well as the dynamic that both features produce in the direction of proceduralization.

As a result, public international law forms a horizontal compilation of agreements between sovereign and equal states that are primarily consent based but that are inspired by idea(l)s that are believed to be universal and thus vertically compelling as holding a supra-state authoritative value. It blends consent-oriented concepts of the international legal order with cosmopolitan visions. It is aimed at managing risks, threats and relations, but also at enhancing cooperation and translating morality transnationally.

Moreover, Antony Anghie argues that the whole international law project was forged in the colonial projects, and that rather than engaged with managing relations among equal Westphalian sovereigns, international law manages domination across the cultural divide between Europe and the rest.[475] The role of the Security Council is illustrative of how different rationales of what international law is and does come together. On the one hand, the Security Council is perceived as reflecting the world's values and enforce with global coercive powers, yet on the other, it is restrained by the principle of consent of those states that sit in the Council that often demonstrate how varied views are on the international level.[476] And those states that have a permanent seat in the Council, reflect the status of world powers in 1945, which enables them, through public international law, to maintain this *status quo*.

Public international law in its current functioning is thus a reflection of idealist and utopian aspirations, invoking morality, global consciousness, and higher values, laid down in (consent based) agreements and decisions of international organizations, reflected in state practice or custom, and general legal principles that are widely

[475] In his work, Anghie shows how the methods and foundational concepts of international law have structurally disadvantaged colonized peoples. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2007).

[476] See for an analysis of the Security Council practice in terms of *trias politica*, Jan Anne Vos, 'World Legislation as Deliberation About the Common Good of International Society' (2011) 8 *International Organizations Law Review* 241-251. Vos shows that the practice of the Security Council does not allow a clear demarcation between the Council's executive and legislative activity.

recognized and shared in domestic settings. Moreover, public international law is both *sui generis* and a derivative from domestic law at the same time. Mégret described public international law as a law 'in between.'[477] It is both inter-state and irreducible on the one hand, and profoundly influenced and even tempted by domestic law as a model on the other.[478] In its expressivist and conceptual function, it blends vertical ideals with a predominantly horizontal, positivist dominated international legal practice, which focuses much on the formal equality of states and state consent as requirement for the validity of norms.

It follows that not only use of force state practice relies on contradicting traditions, but that the framework of public international law itself maintains these contradicting traditions as well. In the framework of international criminal law, the thus already conceptually contradicting framework of public international law is moreover conjoined with the field of criminal law. Because criminal law is developed in many different domestic legal orders, it brings many differing traditions to the table through the various domestic legal orders and legal traditions through which it developed.[479] Furthermore, the idea of criminal law also in itself combines different conceptualizations and rationales of what it aims to do, some of which contradicting each other. And in addition to that, criminal law systems are of themselves a combination of criminal law and human rights law by combining the criminal law idea of inflicting punishment on the individual in a top-down manner with the bottom-up rationale of human rights law to protect an individual against state power, through due process and fair trial rights.

Contrary to public international law, criminal law individualizes and is inherently vertical by nature. It governs the relationship of the state (on behalf of society) vis-à-vis the individual, that has knowingly and willingly transgressed the law, and is therefore subjected to coercive measures. International criminal law has drawn from principles of domestic criminal law systems and has adopted key philosophical commitments of national criminal justice systems.[480] Most importantly, it focuses on individual wrongdoing as a necessary prerequisite to the imposition of criminal punishment, it limits punishment to blameworthy individual wrongdoing through a number of substantial and procedural doctrines, and emphasizes *deliberate* wrongdoing as the only permissible basis for punishment.

---

[477] Frédéric Mégret, 'International Law as Law', in James Crawford & Martti Koskenniemi (ed.), *The Cambridge Companion to International Law*(Cambridge University Press, 2012), pp. 64-92, at 65.
[478] Frédéric Mégret, 'International Law as Law', in Koskenniemi (ed.), *The Cambridge Companion to International Law* (Cambridge University Press, 2012), 64-92, at 65.
[479] For more on pluralism in international criminal law through the conjoining of differing legal systems and traditions, Alexander Greenawalt, 'The Pluralism of International Criminal Law' (2011) 86 *Indiana Law Journal* 1063-1130; Elies van Sliedregt & Sergey Vasiliev, 'Pluralism: A New Framework for International Criminal Justice', in Elies van Sliedregt & Sergey Vasiliev (eds.), *Pluralism in International Criminal Law*(Oxford University Press, 2014), pp. 3-38, at
[480] Allison Marston Danner & Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 *California Law Review* 75-169, at 82.

Criminal law emerged as a body of law in response to authoritarian designations of guilt where little to no rights existed for the accused to receive a fair trial. Criminal law regulates social conduct and proscribes what is considered undesirable and offensive to society; to society and its population's property, safety, security, integrity, moral welfare, and prosperity. It also regulates how to address such offenses, what type of law enforcement is allowed and may be expected by those that violate the law, and what punishment may be inflicted upon those found guilty of the alleged misconduct. The functioning of criminal law is enabled by the monopoly of violence and coercion that lies with the authority, and may be used, in accordance with procedures prescribed by law, against the offender in order to uphold the law, in the pursuit of maintaining order and striving after justice. It is thereby an inherently vertical instrument that is used by the state/authority, on behalf of society, against those that have, knowingly and willingly, acted in ways that conflict with society's norms. Although criminal law incorporates human rights to protect the accused against the state, the primary rationale of criminal law proper is to enforce the law on behalf of society upon the criminal, in a top-down direction. It is society that needs to be protected against criminality and disruptions of the order, through the punishment of those responsible for it.

As was seen in the field of public international law, the field of criminal law is also characterized by internal political struggle. Domestic criminal law systems, as well as international criminal law, usually combine retributivist and preventive theories of punishment and thereby mix contradicting basic assumptions of both.[481] Retributivism justifies the punishment in relation to the committed wrong, which needs to be addressed, vindicated and redressed by punishing the perpetrator. The aim is to provide redress for the victims of the crime and society at large, to strive for justice, and (thereby) maintain order in society. By holding offenders accountable for violating society's norm, society aims to mitigate the incentive for revenge on an inter-personal level, and afflict punishment only for conduct that was criminalized prior to the behavior taking place, and in accordance with prescribed procedures.[482] The retributivist theory holds in itself contradicting approaches that are based on either liberal assumptions or on communitarian assumptions.[483] Liberal assumptions pertain to believing that individuals pursue their individual goals under (social) contractual terms and that others do the same. Criminal law in this view focuses on acts that breach the social contract, and thus breach order.[484] Criminal law thus understood is aimed at restoring the imbalance and vindicating the inflicted wrong.

[481] Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *European Journal of International Law* 561-595, at 568.
[482] Antonio Cassese explains the retributive rationale as follows: '*justice dissipates the call for revenge*, because when the Court metes out to the perpetrator his just deserts, then the victims' call for retribution are met.' Antonio Cassese, 'Reflections on International Criminal Justice' (1998) 61 *The Modern Law Review* 1-10, at 6.
[483] Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *European Journal of International Law* 561-595.
[484] Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *European Journal of International Law* 561-595, at 580.

Retributivist approaches based on communitarian assumptions, on the other hand, presume communitarian interaction between individuals and thus view people as bound together by their shared values, beliefs, concerns and goals. By committing a criminal act, a person 'damages or destroys her relationships with other members of the community, and separates herself from them.'[485] In this view, in addition to defining and proscribing the crime, the role of criminal law is to contribute primarily to rectifying the damage suffered by the community, as well as of the person himself. In either approach, however, punishment is sought as retribution for the committed wrong.

Hannah Arendt viewed retribution as barbaric and rejected the idea that an evil or great crime can offend a natural harmony that only retribution can restore and that punishment is inflicted to restore a moral order.[486] Nuremberg Prosecutor Robert Jackson also expressed a discomfort with justifying criminal law through retributivism. He held that '[t]he satisfaction of instincts of revenge and retribution for the sake of retribution are obviously the least sound basis for prosecution,'[487] pointing at the idea that law is rational rather than pursuing 'intuitive' morals.[488] He thereby expresses the logic of law as something separate from morality and intuition, and that a 'rational criminal policy' *needs* to be distinguished from morality and intuition. But this fails to grasp that justice is a reflection of a society's morality and intuition, and that a criminal justice system strives not only after maintaining order in society, but also at enhancing justice in it, as a reflection of that society's socio-political ideals of what justice entails.

Contrary to retributivist theories of punishment, preventive theories of punishment seek justification of punishment not in retribution for the committed wrong, but in the possibility of preventing future crimes by means of general or special prevention. Punishment is aimed at the future rather than the past conduct. It is aimed at preventing others to commit crimes (general prevention), such as by deterrence, and at preventing the same offender to commit more crimes in the future (special prevention). Preventive theories of punishment follow a consequentialist moral philosophy, understanding the moral value of the act (both crime and punishment) in terms of its societal consequences. It is moreover utilitarian for justifying the infliction of punishment on a few when required for achieving the greatest possible happiness by the greatest number of people involved. The ultimate goal for punishment of an individual is not restituting the wrong he committed but to decrease

[485] R. Antony Duff, 'A Reply to Bickenbach' (1988) 18 *Canadian Journal of Philosophy* 787 - 793, at 787, cited in Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *European Journal of International Law* 561-595, at 580.
[486] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books, 2006), at 277, referencing Yosal Rogat, *The Eichman Trial and the Rule of Law* (Center for the Study of Democratic Institutions, 1961).
[487] See the Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders of 1946, cited by M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law (1992), at 14.
[488] Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *European Journal of International Law* 561-595, at 591.

crime in the future.[489] This preventive utilitarian justification of punishment is therefore less focused on the criminality and blameworthiness of the committed crime and redressing the wrong inflicted, but instead on the consequences of the committed crime and preventing such consequences from occurring again, by aiming at diminishing the risk of future crime.

Criminal law in and of itself is thus already characterized by contradicting traditions that struggle between each other for influence on the development of criminal law. Aside from retribution and prevention that are discussed briefly here, other rationales for punishment include incapacitation, expressivism, the didactic function and historical truth-telling. Sections 6.4 and 6.5 discuss these rationales in more detail and with specific regard to the crime of aggression. The point here is to note that by fusing public international law and criminal law together, not only different rationales of each of these legal frameworks are blended, but each also brings internal contradictions with it.

Additionally, even though criminal law is predominantly aimed at representing society vis-à-vis the individual that has committed a crime, because it also includes due process and fair trial rights to protect the *accused* against the state, it incorporates concepts of human rights. The body of criminal law emerged as a response to largely unrestricted authoritarian decisions on guilt to provide procedures by which the alleged offender was granted with rights in the criminal proceedings against him with the aim to reduce arbitrariness and unbridled exercises of power, increase fairness, and to empower to certain extent the individual against the power that the state exerts on him. In this ideal of protecting the individual against state power, the basic underpinning and assumptions of human rights law emerges.

Human rights law is usually understood as an array of fundamental rights which a person is inherently entitled to by virtue of being a human. The main duties deriving

[489] The preventive and deterrence theory of punishment was originally developed in the 18th century by Jeremy Bentham and Cesare Beccaria. They focused on the threat of formal punishment, in the sense of penalties that are applied by legal authorities, such as the state. Modern deterrence theory has expanded this notion to include also the preventive effect of other types of sanction threats, such as the threat of social censure, the fear of public embarrassment, and self-imposed sanctions, such as shame and feeling guilt, see L. S. Anderson, T. G. Chiricos & G. P Waldo, 'Formal and Informal Sanctions: A Comparison of Deterrent Effects' (1977) 25 *Social Problems* 103-112, H. G. Grasmick & R. J. Bursik, Jr, 'Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model' (1990) 24 *Law & Society Review* 837–862, H. G. Grasmick, R. J. Bursik, Jr. & B. Arneklev, 'Reduction in Drunk Driving as a Response to Increased Threats of Shame, Embarrassment, and Legal Sanctions' (1993) 31 *Criminology* 41–67. See for discussions on the preventive function of punishment also Johannes Bratt Andenaes, *Punishment and Deterrence* (University of Michigan Press, 1974); Mark Maguire, Rod Morgan & Robert Reiner (eds.), *The Oxford Handbook of Criminology*, 5th edn (University of Oxford Press, 2012); A. Bottoms & A. Von Hirsch, 'The Crime Preventive Impact of Penal Sanctions', in P. Cane & H. Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research*(Oxford University Press, 2011), at ; A. Doob & C. Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice: a Review of Research* 143; Franklin E. Zimring & Gordon J. Hawkins, *Deterrence* (University of Chicago Press, 1973); and in the context of international criminal law, see for instance Mirjan Damaška, 'What Is the Point of International Criminal Justice?' (2008) 83 *Chicago Kent Law Review* 329-368 and Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *European Journal of International Law* 561-595.

from human rights fall on states and their authorities; the individual is the object of protection. Like criminal law, human rights law therefore functions according to a vertical relation between state and individual. However, rather than criminal law's top-down direction of enabling the state to act vis-à-vis the individual and inflicting punishment on behalf of society, the object of protection in human rights law is the person vis-à-vis the state, in a bottom-up direction, protecting the individual against the exercise of state power. International human rights law has to that end developed international mechanisms to monitor states in guaranteeing the human rights of their citizens.

Interestingly, in the field of international criminal law, the human rights rationale as protection of the individual against state power has developed into an advocacy field of human rights organizations that are awkwardly fusing utilitarian victim-focused teleological reasoning with defense rights-oriented reasoning. On the one hand, fundamental human rights developed as part of the criminal law tradition to guarantee rights of the defendants, which is the manner in which traditional criminal law jurists work with human rights predominantly. On the other, however, human rights law is an independent field of law that protects through international courts, commissions and investigatory authorities, actively supported by human rights organizations, individuals whose rights are violated by state authorities. In that sense, those individuals are victims of the exertion of state powers. In international criminal law, the two *foci* come together. The *victims* of international crimes are victims of gross human rights violations that are often committed or supported by state authorities. They are therefore often perceived as the logical object of protection for the human rights organizations, who have advocated for decades that mechanisms of international accountability were needed to address those states' abuse of power and violation of fundamental rights through the commission of international crimes. Through that rationale, human rights organizations in the emerging international criminal law field have become advocates for 'more convictions,' to increase the amount of 'justice' that is delivered and decrease 'impunity.' Whereas traditional human rights understandings in criminal law proceedings focused on the rights of the accused vis-à-vis coercion from the authorities through criminal proceedings and punishment, most human rights organizations in the international criminal justice field prioritize protecting and advocating for those that have been victim of crimes, at the expense of defense rights.

The human rights law rationale transposed to the international criminal justice field is thus characterized by a focus on victim issues, that divert from and often oppose and aim at limiting defense rights. For example, it calls for lower evidentiary standards, less strict interpretations of legal provisions in a pro-prosecutorial manner, asserting that this would enhance 'delivering justice' to victims. Robinson argues that this expansive human rights rationale is so prevalent in international criminal law because it relies often on a technique that adopts a purposive interpretative approach, coupled with the assumption that the exclusive object and purpose of international criminal

law is to maximize victim protection notwithstanding the general declarations offered by the international criminal law framework that attest to a much broader conceptualization, and to allow this presumed object and purpose to dominate over other considerations, in needed, even the text itself.[490] Robinson argues that principles like *in dubio pro reo* (when in doubt, decide for the accused) often do not even come into question because the teleological approach that maximizes victim protection does not leave an ambiguity (doubt, *dubio*) to be resolved as it has already resolved the matter *against* the accused.[491] This utilitarian victim-focused teleological reasoning thereby leads to sacrifices of the rights of the accused in favor of general justifying aims of protecting society, ideals of global justice, and seeking to prevent and deter crime by being 'tough on crime.' Paradoxically, whilst invoking this reasoning in order to vindicate the rights of individuals whose rights have been violated by power and authority, at the same time, the ideal of protecting the individual under investigation by international criminal law's authorities that represent power gets dismissed.

In the criminalization of aggression, elements were borrowed from each of these three legal frameworks: public international law, criminal law and human rights law. The next section discusses how each of these emerges in the crime of aggression amendment. The crime of aggression thereby brings together different ideals, such as public international law's ideals to build an international legal order to address and suppress the problem of aggressive war and manage inter-state relations to prevent the need for aggressive war; criminal law's ideals to administer justice for all involved on behalf of society and directed against those personally culpable; and human rights law's ideals to empower individuals against state power and see humanity as such as a protected entity, not restrained by state borders.

5.3 The Normative Foundations of the Crime of Aggression Amendment

In the crime of aggression amendment, ideals and rationales of these different legal frameworks are brought together. First, the public international law rationale is observed because a legal framework is sought to order and manage the interstate relations when it comes to the problem of interstate aggression. But also to express a presumed shared moral conscience against aggressors. Second, to prevent state retaliation and a spiraling out of control with all-out war in a First World War manner, the criminal law retribution rationale is hoped to ward off other states from seeking their own justice and, instead, to find solace in the international mechanism. Moreover, the preventive rationale is pointed to when arguing that the crime of

[490] Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 925-963, at 934.
[491] Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 925-963, at 934.

aggression has deterrent or otherwise preventive effects. Third, the whole idea of a crime of aggression is to hold states accountable for their actions from which individuals are always the victim and to limit state's unbridled exercises of power in a somewhat similar way as for which human rights law emerged. And, the crime of aggression is embedded in the framework of international criminal law that aspires to uphold fundamental rights of defendants by providing them with a fair trial and due process rights, not only to contribute to the fairness of the system, but also in the hope that this contributes to the outreach effect of the international criminal justice enterprise in post-conflict societies. The crime of aggression incorporates core principles of each of the legal frameworks.

The consent principle of public international law first and foremost emerges because the ICC is a treaty-based and thus consent-based institution. Situations in which allegedly international crimes have taken place therefore only fall under the jurisdiction of the Court if these states have consented to joining the ICC. This is only bypassed if the Security Council refers a situation to the ICC on the basis of Article 13(b) of the ICC Statute, relating to a non-state party to the ICC, but the Security Council's authority is also grounded in consent, as provided by the UN Charter, which is also a treaty. Given the voting structure in the Security Council and the ability of some members to veto decision-making, this means that for some states and their close allies, it is impossible to fall under the jurisdiction of the ICC against their express will. Further, in Article 15*bis*(4), the crime of aggression amendment provides that states may opt-out for the crime of aggression by lodging this in a declaration with the Registrar. This bars the exercise of jurisdiction by the ICC over aggression allegations against nationals of that ICC member state when the jurisdiction of the ICC is triggered by state referral or when the Prosecutor exercises its *proprio motu* powers. When a situation is referred to the ICC by the Security Council, the ICC may exercise jurisdiction over state parties and non-state parties alike, in similar manner as for the other crimes under the ICC's jurisdiction. However, unlike the other crimes, with state referrals or *proprio motu*, not only nationals (both perpetrators and victims) of non-state parties are excluded from jurisdiction, a (potentially aggressive) state party to the ICC can escape the jurisdiction of the ICC over aggression entirely by making use of this opt-out procedure, as long as this state has done so prior to committing the allegedly aggressive acts. If a state has a powerful position in the Security Council, or ally that does, all jurisdiction can thus be blocked for the crime of aggression, unless the state does not opt out, or would not block a referring resolution in the Security Council if it would be in the position to do so.

Notably, domestic criminal law systems are not familiar with such consent-based jurisdiction arrangements. It would be rather peculiar, for example, if it would be possible for someone that has committed tax fraud to prevent prosecution by having previously deposited with the government a declaration to opt-out for tax fraud provisions in the criminal code. It contradicts rather fundamentally what a criminal legal system aims to do: to provide equality before the law and to impose a vertical,

authoritative and coercive power relationship upon those that violate it. Moreover, the consent regime in the crime of aggression produces a bias that privileges particular uses of force that are supported by Western conceptions of what humanitarian is or otherwise enhance the interest positions of powerful states, because these are beyond the grasp of jurisdiction. By effectively closing down the possibility for jurisdiction over force used by states that hold veto-power positions in the Security Council and their allies, interventions by those states in foreign situations are *de facto* shielded from the reach of the ICC, which does not exist for force used by states that do not hold a permanent position in the Security Council or are shielded from the ICC's jurisdiction by an ally that does. Consequently, the norm holds a bias in favor of the use of force by the powerful states vis-à-vis use of force by the lesser powers. Yet it are often these powerful states that resort to the most contentious instances of force, for, for example, humanitarian reasons without authorization, or (over?)stretched conceptions of self-defense. The crime of aggression thereby sits somewhat uneasily with criminal law's fundamental notion of equality before the law.

Yet, the crime of aggression also includes elements of criminal law. The crime of aggression individualizes guilt ('by a person')[492] and provides that the ICC can punish those that it finds guilty of the crime of aggression. It is placed in a criminal law framework, providing for criminal legal principles such as *ne bis in idem*,[493] *nullum crimen sine lege*,[494] *nulla poena sine lege*,[495] non-retroactivity *ratione personae*,[496] a number of criminal law defenses that exclude criminal responsibility,[497] and the requirements that both *actus reus* (material elements of the conduct) and *mens rea* (mental element of intent and knowledge) need to be established.[498] Moreover, the framework provides for human rights in the form of due process rights, such as the presence of the person at the trial,[499] the presumption of innocence,[500] evidentiary standards, the right to a public hearing, conducted impartially, to be informed promptly and in detail of the charge, to have adequate time and facilities for the preparation of the defense, and to be tried without undue delay.[501]

[492] Article 8bis(1) Rome Statute.
[493] Article 20 Rome Statute. It provides that a person can only be tried once with respect to the same conduct.
[494] Article 22 Rome Statute. It provides that a person can only be convicted of a crime if the conduct in question constituted a crime within the jurisdiction of the ICC at the time it took place.
[495] Article 23 Rome Statute. It provides that a person can only be punished in accordance with the Statute.
[496] Article 24 Rome Statute. It provides that a person cannot be convicted by the ICC for conduct committed prior to the entry into force of the Statute.
[497] Article 31 and 32 Rome Statute.
[498] Article 30 Rome Statute. It provides that a person can only be convicted if he had the intent and knowledge to commit the material elements of the crime.
[499] Article 63 Rome Statute. At the 12th Session of the Assembly of States Parties in November 2013, this article was under interpretative contestation due to the opposition from Kenya and the African Union, who claimed that this is a right rather than an obligation, and that interpreting this as an obligation, violates the dignity of the Offices of the President and Vice-President of Kenya, who are indicted by the ICC for their alleged roles in Kenya's election violence in 2007 and 2008.
[500] Article 66 Rome Statute.
[501] Article 67 Rome Statute.

The crime of aggression, driven by human rights ideals of holding states accountable for their actions vis-à-vis individuals and communities, thus sits in a criminal legal framework, to enable society to prosecute an individual for the crimes it has suffered, that has incorporated a number of human rights principles to protect the accused against the power that is exerted by the authorities for this purpose, yet similarly upholding public international law's quintessential characteristic, the principle of consent. The crime of aggression thereby blends a vertically organized criminal law – between law enforcer and (alleged) criminal – and a decentralist and horizontally based international law, based on sovereign equality of states. Where criminal law relies on the idea of objectively distinguishing good from bad, public international law's principle of consent holds the rationale that there is no supra-state authority unless so consented to by a state (and thus not truly *supra*-state). The crime of aggression thus fuses a body of law that presumes not only an objective or objectifiable difference between good and bad but also the *ability to distinguish* good from bad with a body of law that presumes particularism and pluralism, materializing in principles like sovereign equality and consent, to address a notion of aggression that is substantively indeterminate, and in a global community that paradoxically calls for a responsibility to protect doctrine and crime of aggression at the same time. The crime of aggression thus brings together principles, purposes, assumptions and rationales that are conceptually speaking mutually exclusive. Bruce Broomhall, for example, speaks of the 'tension – if not a contradiction – between the rule of law for the "vertical order" of international criminal law and the maintenance of the international system through the "horizontal," auto-interpretative, auto-enforcing regime of international law.'[502] Moreover, Dapo Akande, when discussing personal immunities, also pointed to the tension between the horizontal legal order of sovereign equality and the regime of international criminal law.[503] Verticality is a claim of power and authority, where the decentralized regime of managing inter-state relations is based on the idea that one cannot judge over another (*par in parem non habet iurisdictionem*) because one does not hold moral authority over another. The crime of aggression challenges such traditional divisions and picks and chooses from legal frameworks to forge what is either thought to work best for addressing aggressive war, or what was found reachable for achieving consensus.

Moreover, the idea of a vertical relation between warring sides, between one side being the aggressor and the other the representation of humanity/society/order/justice is at variance with the basic premise of the *ius in bello* – international humanitarian law or laws of armed conflict – which holds that all sides in war are regarded as equal before the law, and rights and obligations apply equally to all sides in war, notwithstanding the legality of each party's resort to force. This idea is grounded in the conviction that it is difficult to know which side resorts to force justly, lawfully or

[502] Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, 2003), at 59.
[503] Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 *American Journal of International Law* 407-433.

legitimately, and therefore excludes such complicated assessments from the battlefield. International humanitarian law is developed with the idea to mitigate human suffering in conflicts. It provides for rules that are aimed at protecting persons and objects in armed conflict and limits parties' choice to use weapons and means of fighting the war. Violations of international humanitarian law are war crimes.

All sides need to respect these rules of armed conflict, and thus are required to distinguish between combatants and civilians, refrain from using certain weaponry, and uphold principles of necessity and proportionality. This characteristic of a horizontal rationale for the application of the rules of armed conflict is not only intended to protect foot soldiers and their commanders who aren't expected to be able to make assessments to which side is justly waging war, but also a recognition of the indeterminacy of the notion of aggression. If a 'higher authority' than those fighting on the ground could determine easily and objectively who the aggressor is and who the law-enforcer, this objective assessment could be spread among the combatants, now likely faster than in the 19th century when international humanitarian law first developed as a legal framework. However, such higher authority with the 'right' answers to the complex question of the legality and legitimacy of war is absent and fundamental disagreement on the matter prevails in many a conflict. Hence, in order for the rationale of international humanitarian law to be realized, the *ius in bello* is applied equally between sides.

Criminal law, to the contrary, per nature applies unequally between sides, and provides one side (the law enforcer) with privileging means over the other side (the criminal), who loses its right to resist other than through the rights the criminal proceedings grant him to allow a fair trial. In order to justify this vertical relation, the distinction between right and wrong, between the law enforcer and the criminal, between the non-aggressive and the aggressive use of force, must be determinable with authority.

And it is here that critics of the crime of aggression point to the difficult distinction between aggression and non-aggression and the tension this causes with one of criminal law's core principles, the principle of legality.[504] The legality principle provides that criminal law needs to be clear, that no one will be convicted of a crime for conduct that was not criminalized at the time the conduct took place (*nullum crimen sine lege*), and that no-one can be punished for conduct unless this sanction is provided by penal law (*nulla poena sine praevia lege poenali*). It includes the prohibition to apply criminal law retroactively. The essence of the principle of legality is that an individual may not be prosecuted for conduct that it could not know was criminal and punishable. Criminal law therefore needs to be clear to make its

[504] For example, Michael J. Glennon, 'The Blank-Prose Crime of Aggression' (2010) 35 *The Yale Journal of International Law* 71-114; Elizabeth Wilmshurst, 'Aggression', in al. (ed.), *An Introduction to International Criminal Law and Procedure*, 2nd edn (Cambridge University Press, 2010), (Add the crime of aggression and legality critiques here)

consequences foreseeable.[505] The Nuremberg and Tokyo Tribunals been heavily criticized for violating the principle of legality by convicting individuals for the crime of aggression which was probably not a crime at the time. The current crime of aggression is criticized by many commentators for violating the legality principle by lacking clarity. For example, Glennon raises concerns that the crime of aggression is not defined with sufficient clarity to eliminate guesswork as to its meaning and that the international administrative process leading to its prosecution provides a discretion to decision-makers that does not preclude the possibility of arbitrary and discriminatory prosecution. He asserts that the crime of aggression's definition suffers 'from overbreadth and vagueness, does not provide sufficient notice to potential defendants as to what conduct is permitted and what is proscribed.'[506]

By combining human rights law, which actively seeks *broad* interpretations, with criminal law, which is fundamentally bound to *strict* interpretations in order to respect the legality principle and justify the vertical application of coercion against individuals, judges in international criminal trials are asked to apply law both broadly *and* strictly, seeking to expand the reach of provisions *and* interpret them as strictly as criminal law requires. While criminal law principles prohibit judicial expansion of norms, the human rights rationale embraces that very expansion.[507]

A final remark on the blending of legal rationales moves from the level of legal frameworks to the institutional level. There, the ICC exerts itself as independent from and 'vertical' vis-à-vis states, as part of international criminal justice's claim to distinguish and dissociate itself from the inter-state world.[508] Yet, international criminal justice not only relies entirely on the inter-state world for its financing and for cooperation in arresting suspects and investigating situations, the ICC also remains a treaty-based body that seeks wider acceptance of states to join the ICC, and relies heavily on consent of states (the state involved or those in the Security Council) for triggering jurisdiction.

The way in which international criminal tribunals have claimed supranational power is by pointing to the higher status of the values that are infringed by the commission of international crimes, referring to these crimes, for instance, as *mala in se*. They invoke a natural law logic to justify this verticality and buttress this by asserting that states have given their consent when signing up to the ICC, or to the UN when jurisdiction is attained through a Security Council referral for violating 'universal'

[505] Ward N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (T.M.C. Asser Press, 2006), at 238.
[506] Michael J. Glennon, 'The Blank-Prose Crime of Aggression' (2010) 35 *The Yale Journal of International Law* 71-114, at 88.
[507] Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 925-963, at 946.
[508] See Frederic Megret, In search of the 'Vertical', p. 51. In this article, Mégret argues that contrary to inter-state criminal law cooperation (such as in addressing international organized crime, extradition and jurisdiction), the international criminal tribunals are and aspire to be in a vertical relation with states, as part of international criminal justice's claim to dissociate itself from the inter-state world, even though the system crucially relies on it.

norms. Logically speaking, these two rationales are mutually exclusive: either international criminal law is binding because it derives from natural law and is therefore independent from a state consenting to it, or international criminal law is an inter-state system, based on and requiring state consent. Nevertheless, international criminal justice fuses the two, buttressing the weakness of the one with the other and *vice versa*, in a claim to authority. This was also observed to occur in the Nuremberg judgment, where both (mutually exclusive) rationales were fused to argue that aggression was a crime under international law at that point in time. As is discussed in the section on the Nuremberg Tribunal in Chapter 4, arguments pointing to the criminality of aggression based on morality were buttressed by arguments pointing to the consent that states were asserted to have given in treaties, intending to criminalize aggression. Yet, either this consent of states is the source of law's bindingness, or it is morality that binds, but it must be either one or the other, as they mutually exclude the other as ultimate rationale for why law binds.

Similarly, in Kampala, rationales that are founded in the idea of consent, horizontality, particularism and a subjective notion of justice were brought together with vertical rationales that are based on universal and objective ideas of justice. As Chapter 3 discussed, this fusion was also observed in the construction of the collective security system, which borrowed elements from the 'just war'-tradition and 'war as institution of law'-thinking. Whether or not this provides for a better way to manage international relations, having observed that either of the traditions led to warfare nevertheless, it also provided a wide and open space for argumentative practices on the aggressiveness of use of force. With the crime of aggression, this blending of conceptual contradictions, a coming together of contradicting underlying assumptions, now not only forms the normative framework through the 'use of force'-discourse, it is also incorporated in the criminal law norm itself.

Even though seemingly challenging as a criminal law norm and conceptually contradictory as to its normative foundations, this crime of aggression amendment achieved consensus among the member states of the ICC. It did so in absence of substantive agreement on what aggression exactly is and achieved to gain at least some measure of the disciplining power of law and create a procedure with which the aggression norm may be adjudicated in a criminal court of law in the future. The next chapter discusses what this may entail for the ICC if it would eventually come to prosecuting state leaders for the crime of aggression.

6. ADJUDICATING AGGRESSION

The UN was created in 1945 in San Francisco. During those negotiations, the United Nations' primary purpose was agreed to be 'to maintain international peace and security; and to that end to take effective collective measures for the prevention and removal of threats to the peace and the suppression of acts of aggression or other breaches of the peace (…).'[509] At the same time, but on the other side of the world, Nazi leaders sat in the dock at Nuremberg. They were tried for, amongst other things, their aggressive wars against other states in Europe. The Nuremberg Tribunal declared that aggression, then referred to as 'crimes against the peace', '… is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.'[510] With the establishment of the UN and the conclusion of the Nuremberg and Tokyo Tribunals, war was finally to be abolished, leaving only policing actions in the name of the international community, through Security Council-authorized use of force. The collective security system would condemn a violator as a criminal aggressor, and all other states would join together to punish the aggressive state and protect its victim.

Yet, history has not worked out that way. Many wars have been fought since 1945, and aggression has been ignored, tolerated, relabeled, and permitted (although sometimes reluctantly), whilst there has been very little use of the notion of 'aggression' by the Security Council. Nor has there been much adjudication regarding accusations of aggression. Aside from the post-WWII Nuremberg and Tokyo military tribunals, never has an international tribunal determined that a party committed aggression. Indeed, if adjudicators discuss it at all, they limit their deliberations to whether or not a state violated the prohibition to use force, as provided by Article 2(4) UN Charter and customary international law, and leave the question of the *aggressiveness* of that use of force to the political realm of states and the Security Council.

That is, until now, perhaps. The crime of aggression amendment that was adopted in Kampala in 2010 has opened possibilities for potential future trials. If sufficient states so decide after 2017 and ratify the amendment to the Rome Statute on the crime of aggression, the ICC will be able to adjudicate the question of whether an individual is guilty of committing the crime of aggressive use of force. This contains in it the question of whether or not a particular use of force is aggression or, instead, a non-manifest violation of the UN Charter by its character, gravity and scale.

This chapter focuses on adjudicating the notion of aggression. In line with the argumentation previously developed, it asserts that the reason why courts and the Security Council have been reluctant to use the notion of aggression is because this

[509] The Dumbarton Oaks Proposals for a General International Organization, Ch. I, Article 1.
[510] United States of America et al. v. Goering et al., International Military Tribunal, Judgment, 30 September – 1 October 1946, (1947) 41 Am J. Int'l L. 172, at 186.

entails determining not just the *legality* of a use of force, but also its *legitimacy*, a question that is much harder to agree upon within the diverse transnational sphere. The chapter discusses how the crime of aggression that is constructed during and in the run-up to the Kampala Review Conference can be imagined to play out in the institutional setting of international criminal law. To that end, it explores the consequences of criminalizing aggression and triggering the ICC's jurisdiction over this crime in the context of adjudicating an aggression case at the ICC, the type of questions that judges must resolve in criminal cases, and the judicial strategies that these questions generate.

What is at stake here, as was seen before, is that the terms of the amendment on the crime of aggression do not resolve substantive contestation but instead delegate it to the judges sitting on the ICC bench. This places the judges and the Court itself in an awkward position, where they are asked to resolve questions that the political system could not agree on, on the basis of a norm that is indeterminate. And furthermore, because such trials will be unable to resolve these fundamental substantive disagreements, political struggles over the notion of 'aggression' will continue, differing from prior discussions only in that they will now reflect whatever new argumentative strategies the trial has opened and closed.

6.1 Reluctance to Adjudicate Aggression

Previous chapters described how the issue of the right to go to war turned into a question to be adjudicated by a court of law. The notion of aggression has had a long history in which law was considered and discussed as a (potential) tool to suppress and prevent its use as instrument in international affairs. This has always been challenging because ultimately, even though states want to make sure that others cannot fight wars against them, they have not been willing to give up their own ultimate and fundamental right to resort to force when they perceive it as necessary for self-preservation, to protect vital interests or fundamental values, or to resist or respond to injustice.

Moreover, it has not been a lack of insight into the horrors of war and the need to address and prevent violence nor a lack of legal skillfulness why it has been difficult to create a system for adjudicating international aggression. It is an absence of consensus as to which wars are aggressive and which are deemed legitimate. As discussed in Chapter 4, the notion of aggression is least problematic in the abstract. Almost everyone agrees that aggression is detrimental to the functioning of international relations and should be suppressed. The problems with the notion of aggression increase when it becomes more concrete: precisely which situations are aggressive? Who should determine this and how? These issues remain unresolved

despite centuries of work and argument by legal, political and philosophical scholars.[511]

Aside from criminal prosecution at the ICC, other legal *fora* are also competent to adjudicate aggression. UN member states can bring cases against alleged acts of aggression by another state before the ICJ. As the UN's principal judicial organ,[512] the ICJ may decide disputes between states on whether or not aggression has occurred. The ICJ is, however, restricted by the requirement that it may only give such a judgment in cases between i) states that ii) agree to submit the specific case to the jurisdiction of the ICJ.[513] Moreover, designated organs of the UN, including the General Assembly and Security Council, can refer a question on aggression to the ICJ through the Advisory Opinion procedure.[514]

Through the doctrine of state responsibility, violations of international law can be ascribed to states and coupled to reparations. The doctrine of state responsibility provides that when a state commits an internationally unlawful act against another state this entails the international responsibility of that state. State responsibility requires at least that, firstly, there must be an existing international legal obligation (such as the prohibition on using (aggressive) force or the obligation to refrain from intervention into the affairs of another state). And secondly, that there must have been an act or omission which violates that obligation and which is imputable to the responsible state.[515] As noted in Sections 2.3 and 4.3, even though it was long believed that the Articles on State Responsibility would include aggression, after years of debate, the International Law Commission decided to delete any reference to the concept of 'international crimes' from the Draft Articles on State Responsibility, including the crime of aggression. Repeating some of the discussions of the definition of aggression negotiations in the 1950s, 1960s and 1970s, the drafters in the International Law Commission could not agree on the legal consequences for such crimes other than those already existing under the state responsibility and United Nations regimes.[516]

Despite its competence to do so, the ICJ has generally declined to discuss aggression. In several aggression-related cases that were brought before the Court, the ICJ concluded that it lacked the jurisdiction to proceed. This was the case, for example, in the Aerial Incident cases in the 1950s,[517] Serbia's charges against a number of NATO

[511] See Martti Koskenniemi, ''The Lady Doth Protest Too Much.' Kosovo, and the Turn to Ethics in International Law' (2002) 65 *The Modern Law Review* 159-175.
[512] Art. 92 UN Charter.
[513] Articles 34-36 ICJ Statute.
[514] Article 65 ICJ Statute read in conformity with Article 96 UN Charter.
[515] Articles on Responsibility of States for Internationally Wrongful Acts.
[516] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* (Vol. II, Part Two, 2001), p. 278-279.
[517] Aerial Incident of October 7t, 1952 (USA v. USSR), Order, [1956] ICJ Reports 6; Aerial Incident of March 10th, 1953 (USA v. Czechoslovakia), Order, [1956] ICJ Reports 6; Aerial Incident of September 4th, 1954 (USA v. USSR), Order, [1958] ICJ Reports 158, Aerial Incident of 7 November 1954 (USA v. USSR), Order, [1959] ICJ Reports 276.

states for their 1999 bombing campaign,[518] and recently in the conflict between Georgia and Russia.[519] In other cases, the ICJ avoided deciding on the aggressiveness of use of force, parties decided to withdraw the complaint, or settle out of court.[520]

In the 2005 *Armed Activities* case between Congo and Uganda the ICJ did address the prohibition of use of force under the UN Charter.[521] In that case, the Court was asked to rule over the question whether the presence of Ugandan troops in the DRC violated international law. The ICJ ultimately found Uganda responsible for the unlawful use of force in the DRC.[522] The ICJ held that Article 2(4) of the UN Charter was a 'cornerstone' of the UN Charter, that the provision on self-defense had to be read narrowly, and that the notion of self-defense does not 'allow the use of force by a State to protect perceived security interests' beyond the wording of Article 51 (though it did not say that an 'armed attack' must already have occurred).[523] The ICJ rejected the Ugandan argument that its occupation of towns and airports in the Congo was not for the purpose of overthrowing the Congolese government but for its own security needs, and held that Uganda had violated the principles of non-intervention and the prohibition to use force. It even held that Uganda's unlawful military intervention amounted to a 'grave violation of the prohibition to use force' as provided by Article 2(4) UN Charter.[524] Despite all of this, however, the ICJ did not engage with the question of whether or not this amounted to aggression and did not adjudicate the DRC's claim that Uganda had committed aggression. The case therefore did little to clarify which instances of unlawful use of force actually rise to the level of aggression.

Other international bodies with competence to hear cases regarding aggression have also failed to provide significant guidance on the limits of this international crime. In the Eritrea-Ethopia dispute before the Eritrea Ethiopia Claims Commission, for example, both parties accused each other of committing aggression. The Commission

[518] Such as, for instance, against Belgium, Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 279.
[519] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 70.
[520] See for instance Border and Transborder Armed Actions (Nicaragua v. Honduras), Order, [1992] ICJ Reports 222; Border and Transborder Armed Actions (Nicaragua v. Costa Rica), Order, [1987] ICJ Reports 182; Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Rwanda), Order, [2001] ICJ Reports 6; Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Burundi), Order, [2001] ICJ Reports 3; Aerial Incident of 3 July 1988 (Iran v. USA), Order, [1996] ICJ Reports 9.
[521] Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda) (Dec 19, 2005), [2005] ICJ Reports 116.
[522] The Court also found that Uganda had violated international humanitarian law and human rights law. In turn, the Court concluded that the DRC had violated its obligations under the 1961 Vienna Convention on Diplomatic Relations by seizing property from the Ugandan embassy and maltreating Ugandan diplomatic personnel.
[523] International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, 168, para. 148. See also Jan Klabbers, *International Law* (Cambridge University Press, 2013), at 192.
[524] International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, 168, para. 164.

concluded that even though Eritrea had violated Article 2(4) of the UN Charter, it did not find that Eritrea had initiated a war of aggression.[525] The Commission made a distinction between an armed attack that is also an act of aggression and an armed attack that is not such an act.[526] The ruling thereby asserted that 'aggression' is narrower than the category of 'armed attack', which itself is narrower than 'illegal use of force'. The Commission's award and reasoning were criticized for reducing the scope of the concept of aggression to a minimum.[527]

There has thus been limited adjudication on aggression and limited judicial activity to develop or explain the legal framework around the notion of aggression. Perhaps this will change in the future, if and when the ICC begins exercising jurisdiction over aggression.

6.2 About the Train that Left the Station

In 2010, the international criminal justice community celebrated the fact that they were able to close the ICC Review Conference in Kampala with a consensus agreement on a definition of aggression and on how the ICC would exercise jurisdiction with regard to aggression. To date, however, fundamental disagreement remains on which uses of force do and/or should fall within the scope of the crime of aggression. In the turn to law to try to escape the politics of the determination of aggression, the only way to reach agreement was to speak in the abstract, where agreement existed on the undesirability of aggressive war in general, and to create open norms and criteria that could be read by different parties in different ways. Yet, the definition's 'manifest violation'-criterion nor any other part of the amendment overcomes the fundamentality of this disagreement. The crime of aggression amendment therefore does not provide for a *meta-criterion* to choose between fundamentally opposing conceptual frameworks or differing perspectives and interpretations of reality.[528]

What it does do, however, is move the question of the aggressiveness of a particular use of force away from the question of the (il)legality of use of force and toward the question of the (il)legitimacy of use of force, as was discussed in Section 4.3.2. If a

[525] Eritrea-Ethiopia Claims Commission, Partial Award *Jus Ad Bellum*, Ethiopia Claims 1-8, between The Federal Republic of Ethiopia and The State of Eritrea, 19 Dec 2005.
[526] Ige F. Dekker & Wouter G. Werner, 'The Crime of Aggression and the Eritrea-Ethiopia Armed Conflict', in Andrea de Guttry et al. (ed.), *The 1998-2000 War between Eritrea and Ethiopia* (Cambridge University Press, 2009), at 251.
[527] For example by Ige F. Dekker & Wouter G. Werner, 'The Crime of Aggression and the Eritrea-Ethiopia Armed Conflict', in al. (ed.), *The 1998-2000 War between Eritrea and Ethiopia* (Cambridge University Press, 2009), at 251.
[528] I have also written about this and how this enables the use of legal arguments that are based on contradictory underlying assumptions and lawfare in Marieke de Hoon, 'Collateral Damage from Criminalizing Aggression? Lawfare through Aggression Accusations in the Nagorno Karabakh Conflict' (2012) 5 *European Journal of Legal Studies* 40-61, at 41.

use of force is illegal but not a manifest violation of the UN Charter, it is not aggression. Determining what is a manifest violation (and therefore an illegitimate war) requires a purposive analysis of the UN Charter and thus of the international legal order. However, this exercise suffers from fundamental disagreements on what the 'international community' is and stands for, what it aims to do and how, the nature of the UN's authority, the source of international law's binding character, and its relations with transnational politics and with international criminal justice. The question is therefore still 'legal' (as well as 'political'), but moves the assessment of criminality from the already highly contested interpretation of whether resort to force is legal or not, with all its difficulties in and of itself,[529] to the question of whether it is legitimate in light of the UN Charter. However, there, on top of everything else, questions such as what is just and necessary become principal measures on which the criminality of conduct is assessed. The reluctance to adjudicate aggression and the disagreement on whether and how to define it, stem from the complexity that underlies the relationships between transnational law, politics, international criminal justice and the notion of aggressive war.

By ignoring or skillfully deferring debate about these substantive disagreements, the goal had been achieved: there is a criminal court that will likely have jurisdiction over the crime of aggression. Aggressive use of force is finally to be abolished, and if in the future someone dares to do it anyway, he or she will be punished in the eyes of the world. 'End to impunity!' is the credo of the day.

Once behavior is framed as illegal and criminal, once the language of law creates a distinction between a right and wrong side and raises the expectation that there is indeed an abstract dividing line between them, the predictable consequence is that there will be calls upon 'the international community' for 'justice' for those who fall victim to aggression and 'accountability' of those responsible. In other words, once a problem gets framed in the language of criminal law, there will be calls to enforce this law and to adjudicate the crimes it defines.[530]

The complexity behind the notion of aggression and the fundamental disagreement of what it is was not a consideration that negotiators felt was crucially important in Kampala. Any consideration or second thought about whether international criminal law was an appropriate place to deal with aggression was waived away under the mantra: 'that train has left the station.'[531] Meaning: 'Shut up, this is an irreversible

[529] For example, the legality of self-defense against non-state actors, the limits of anticipatory self-defense, and the interpretation of UNSC authorizations.

[530] Sean Murphy makes the argument that because the ICC will have jurisdiction over the crime of aggression, they will become an important voice in the discussion on the legality of humanitarian intervention because prosecutions for humanitarian interventions will strengthen the view of humanitarian intervention as illegal, whereas the lack of prosecution leads to strengthen the view that such intervention is lawful from which criteria for lawful/unlawful interventions will be derived. Sean D. Murphy, 'Criminalizing Humanitarian Intervention' (2009) 41 *Case Western Reserve Journal of International Law* 341.

[531] I attended the Rome Statute Review Conference in Kampala as delegate of the Public International Law & Policy Group (PILPG), an observing NGO.

course. We can't now say we won't do it, can we? Not after the Nuremberg Tribunal called it the "supreme international crime." And anyway, we already decided in Rome that we couldn't have an International Criminal Court without the crime of aggression.' So the problem was passed on to the judges, justified by the platitude 'have faith in the judges.'

The overriding sense during those weeks in Uganda and the preceding years during which the definition of aggression and crime of aggression amendment were prepared, was that the delegates should work towards a consensus to bring the crime of aggression under the jurisdiction of the ICC (i.e. to enable adjudication by criminal trial). For many in Kampala, this meant having faith in the ability of judges to resolve these issues in the end, and/or the assumption that the criminalization of aggression would help achieve certain goals in the international criminal justice and peace projects. The sentiment was that progress, ending impunity, saving succeeding generations from the 'scourge of war,'[532] and the civilizing project of international relations would all come another step closer to realization.

For example, when the debate in Kampala between members of the Assembly of States Parties was confronted with publicly pronounced extreme positions that seemed unlikely to lead to a consensus,[533] Ben Ferencz, who prosecuted Nazi leaders for aggression at Nuremberg, took the stage. He spoke to the statesmen and diplomats passionately about how the idea of creating a crime of aggression under the jurisdiction of the ICC would end the impunity of those who use aggressive force. On behalf of the 'conscience of humanity,' he said, there should be a court to try those responsible for this supreme international crime. He addressed the delegates about

[532] Preamble UN Charter.

[533] For instance, compare the positions of France and Trinidad and Tobago at the Review Conference's General Debate on 31 May and 1 June 2010 with regard to the role of the Security Council in determining acts of aggression: France: 'Indissociable du système des Nations Unies, la Cour doit s'appuyer sur les organes compétents et, en particulier, le Conseil de sécurité qui détient la responsabilité principale du maintien de la paix et de la sécurité internationales. C'est à lui seul qu'incombe la détermination de l'acte d'agression. Cette position découle du Statut de Rome comme de la Charte des Nations Unies.' [« As an inseparable part of the United Nations system, the Court must rely on its competent organs and, in particular, the Security Council, which has the primary responsibility for maintaining international peace and security. That body alone is responsible for determining acts of aggression. This position is in accordance with the Rome Statute as well as the United Nations Charter»] (Texte de la declaration française à Kampala, p.1-2, document on file with author, author's translation); Trinidad and Tobago: 'In 1989 when the Honourable Arthur NR Robinson, former Prime Minister and later, President of the Republic of Trinidad and Tobago took the political initiative to reintroduce on the agenda of the United Nations the urgent need for the establishment of a permanent International Criminal Court, he envisioned a Court that was independent of any entity in the exercise of its jurisdiction over crimes which shock the conscience of humanity. The spirit and letter of the Rome Statute establish the independence of the Court, whilst recognising its relationship with the United Nations. Trinidad and Tobago is, however, concerned about the attempts to undermine the independence of this institution, which remains for thousands of victims of hapless crimes, the only beacon of hope for the realisation of justice. It is for this reason, Mr. President, that we urge this Review Conference to defend the independence and integrity of the Rome Statute during its examination of the proposal to amend the Statute to adopt a definition of the crime of aggression so that the Court may exercise its jurisdiction over this crime.' (Statement by H.E. Patrick Edwards, p.2-3, document on file with author)

their differences on the various aspects of a crime of aggression. 'Use your skepticism to work harder,' and don't leave this 'license to kill that we are here to stop,' Ferencz urged. And while pointing his finger as if to stress his argument, he called upon the delegates, the diplomats that were there on behalf of the States Parties to the ICC, to leave the difficult issues that they could not agree upon to the judges. 'Leave it to the judges to interpret,' 'this is how we go to a more humane world,' and the crowd stood up and applauded.[534]

What Ben Ferencz said was that the law-makers were in Kampala to make a law. They should not try too hard to overcome their differences if that would stand in the way of creating international criminal jurisdiction over those who use aggressive force against other states. The judges would be in a better position to resolve any remaining issues. One can wonder about this division of tasks between legislators and adjudicators. Of course, in most legal systems it is within the purview of the judge to decide on hard cases, and in that process judges 'make' law. But the complexity of an aggression case is that it goes beyond a typical 'hard case' that requires adjudication on an underdetermined notion, since there are no abstract legal rules available due to the indeterminacy of the notion of aggression: the disagreement is fundamental due to reliance on different, and often even contradicting underlying assumptions, and the indeterminacy that lies in the deep structure of the norm (as was discussed in Chapter 1). This is not to say that there are no other hard cases in which fundamental contestation occurs, and in which notions of 'the good' also play a crucial role. In such cases too, judges have fundamentally different views and are left to decide those cases nevertheless on the presumption of 'applying and interpreting law.' In an aggression case, this problem occurs practically invariably. In the absence of a meta-criterion to choose between fundamentally differing worldviews, between contradictory assumptions that underlie the current use of force concept, between what different people consider to be 'the good,' how is a judge to adjudicate such matters? No doubt a judge *can* make a choice in a concrete case. However, if the Assembly of States Parties to the ICC (nor any other special committees, working groups, or the International Law Commission) cannot come to agreement on how to distinguish between aggression and non-aggression, what does it mean to leave this decision up to a judge or panel of judges to decide?

Moreover, by sidestepping the recognition of the essentially political core of the dispute and thus allowing a void rather than guidance on questions such as who to prosecute and when the Security Council should intervene, a structural indeterminacy is placed at the core of the international criminal justice system. Even though the crime of aggression gives the illusion of an international rule of law, the ingrained unresolved legitimacy issues are sidelined in this push for adjudication-based justice. Yet, by embracing the 'train has left the station' and 'have faith in the judges' mantras, the Kampala delegates chose to accept whatever challenges the adjudication

[534] Excerpts of the speech delivered by Ben Ferencz during the plenary session on 8 June 2010, during the ICC Review Conference In Kampala.

of aggression would bring in the future, in the sheer optimism of a progress ideal or pessimism that it was better than the alternatives. The common belief was that adopting an abstract and indeterminate crime of aggression amendment was better than leaving it outside the realm of law in the policy domain; that law's power would generate more beneficial than harmful effects. It is hard to research the validity of such claims, and the future will tell. In the next sections, this chapter discusses some of the challenges that the crime of aggression amendment will face during adjudication, by zooming in on the specific tasks of the judges who will deal with this definition of aggression and its repercussions, and on the defense strategies that the accused is left with.

6.3 Judging the Legitimacy of the Use of Force

With the 'manifest violation'-criterion in the crime of aggression amendment, fundamental disagreement on what constitutes a legitimate use of force is transposed to the crime of aggression, as well as to the application of criminal law to the actions of individuals. Whether a violation of the UN Charter is regarded as 'manifest' depends, *inter alia*, on what one considers the purpose of or hierarchy in purposes of the UN Charter. For example, a humanitarian intervention could be considered aggression because it is the purpose of the UN Charter to prevent war. But a humanitarian intervention could also be considered *non*-aggression because it is the purpose of the UN Charter to protect human rights by defending individuals against harm committed by oppressive regimes.

Because the crime of aggression does not guide the decision-maker or adjudicator with respect to how to interpret the UN Charter's purposes nor which worldview to prefer, which subjective interpretation of reality is correct, or which view to hold on what brings about sustainable peace and security, the 'manifest violation'-criterion does not resolve the question of which uses of force are aggressive. Instead, it emphasizes that whether a resort to force falls under the scope of the crime of aggression depends on its *legitimacy*. Not only must the underlying use of force be in violation of the UN Charter and thus illegal, but it must also be illegitimate: a *manifest* violation of the UN Charter.

As was discussed in Chapter 4, while some scholars address this problem by interpreting 'manifest' to exclude all cases that are contested, and thus all situations where an argument can be made for their legality or its legitimacy,[535] others find this position highly problematic since there is hardly a resort to force that cannot be *argued* by a skilled lawyer to be lawful or at least legitimate, based on claims of necessity, justness or humanitarianism. Not only would it likely leave the crime of

[535] See for instance the statement US Delegate Harold Koh made in Kampala during the Rome Statute Review Conference in Kampala on 4 June 2010 that was discussed in Chapter 4 (on file with author).

aggression amendment a dead letter from the start, they assert, one need not have a very creative sense of imagination to understand that this opens up a wide range of potential justifications for resorting to force. It thereby creates what former British minister of foreign affairs Austen Chamberlain, in a statement in 1927 pointing to the perverse consequences of a definition of aggression, called a 'trap to the innocent and a signpost for the guilty,' making it abundantly clear how to argue one's way out of criminal accountability.[536]

The Kampala amendment tries to address this problem by including the 'understanding' that the scope of the crime of aggression is to not have effect on 'existing or developing rules of international law for purposes other than this Statute.'[537] However, when a rule distinguishes between what does and what does not fall under the prohibited (and in this case, criminalized) acts, it inherently affects the development of the norm and its interpretation. It will naturally be invoked in all discussions on the prohibition of the use of force norm, and thus cannot be seen as separate from the wider process of (re)constituting and (re)shaping the norm.

Placing aggression within the purview of international criminal law, an area reserved for the 'most serious crimes of concern to the international community as a whole,'[538] and aimed at reflecting a shared understanding of conduct *mala in se*, presumes that there is universal, or near universal, agreement about the criminality of the underlying behavior. However, taking into consideration the discussions about humanitarian intervention, responsibility to protect, the role and functioning of the Security Council, and the scope of self-defense, universal agreement over the criminality of the *actus reus* seems far away. Under the current definition of aggression, the same conduct can be understood as heroic by some and supremely criminal by others. This flipside of this 'supreme crime' of aggression is that the same behavior can be seen as not only excusable and not blameworthy, but actually praiseworthy and pleaded for, by some even referred to as a responsibility (to protect, to defend). And this position is often buttressed by similarly sound legal reasoning as is the position of its criminality. That behavior can be supremely criminal and heroic at the same time is problematic for adjudication. As Sean Murphy explains, 'there is no obvious basis on which institutional structures can reach principled determination about the meaning of the norm.'[539]

The crime of aggression tries to simplify a question that is rarely that straightforward: what caused a war? To emphasize this point, Judge Kooijmans introduced his

[536] Martti Koskenniemi, 'A Trap to the Innocent…', in: Claus Kress & Stefan Barriga (eds.), *The Crime of Aggression – A Commentary* (Cambridge University Press, 2016 (forthcoming)), who cites former UK foreign minister Austen Chamberlain cf Bengt Broms, 'The Definition of Aggression' (1977) 154 *Recueil des Cours* . See also Julius Stone, 'Hopes and Loopholes in the 1974 Definition of Aggression ' (1977) 71 *American Journal of International Law* 224-246.
[537] Understanding 4, Annex III to the Amendment for The Crime of Aggression, Assembly of States Parties to the Rome Statute, Resolution RC/Res. 6.
[538] Preamble, Rome Statute.
[539] Sean D. Murphy, 'Aggression, Legitimacy and the International Criminal Court' (2009) 20 *European Journal of International Law* 1147-1156, at 1151.

Separate Opinion in the *Armed Activities* case by quoting John P. Clark, who said the following about the Ugandan intervention in Congo:

> '[T]o explain the intervention of one State into the affairs of another is rarely simple or uncontroversial (…) To maintain objectivity in the face of confusing and contradictory evidence is particularly difficult. (…) Moreover the results are likely to be tentative, partial and complex, and therefore less than totally satisfying. One is more likely to end with a 'thick description' of a complex episode than a 'scientific' explanation of a discrete social event.'[540]

Adjudicating such an essentially contested and indeterminate notion in a criminal court of law raises various concerns for the traditional criminal law paradigm, some of which were raised in Chapter 5. For the task of adjudication, a predominant concern is the fact that a judge is forced to choose one conceptual framework over another, one conception of the 'good' over another, or one understanding of what is necessary over another. This is not to say that a judge or panel of judges is not *able* to make a choice, because obviously, in a concrete case, a judge can always say yes or no, right or wrong, red or blue. The point is rather that placing such a question before a judge results in a level of unpredictability that raises tensions with criminal law's principle of legality and enables a structural indeterminacy in the institution beyond individual judges' decision-making.

In Kampala, it was not unknown or a secret that disagreements existed on the aggression/non-aggression-distinction, what the term 'manifest' entailed, and the scope of legitimate war. For instance, Stephen Rapp, speaking for the United States, which attended the ICC's Review Conference as an observer state, pointed to these differing underlying assumptions by asking: 'What impact would moving forward in the absence of clarity and consensus – *real* consensus, not expedient compromise – on these fundamental questions have on the Court itself? Will States parties enhance prospects for universality by moving to adopt this crime at a time when there is genuine disagreement on core issues, or by placing the prosecutor in a position where he must make decisions – whether to pursue aggression charges in particular cases – that organizations such as Human Rights Watch have cautioned "may well give rise to perceptions of political bias and instrumentalization – even if such perceptions are … unfounded?"'[541] Rapp furthermore concluded that 'moving forward now on the crime of aggression *without* genuine consensus could undermine the Court.'[542] A few days later, Harold Koh, also on behalf of the US delegation, reiterated this position by raising the question of whether 'despite the considered attention that has been given to Article 8*bis*, genuine consensus has been reached regarding the *meaning* of the

[540] Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Separate Opinion Judge Kooijmans, para. 2, quoting John P. Clark, Explaining Ugandan Intervention in Congo: Evidence and Interpretations, 39 The Journal of Modern African Studies (2001), p. 262.
[541] Statement made by US Delegate Stephen Rapp during the Rome Statute Review Conference in Kampala on 7 June 2010, at 5 (on file with author).
[542] Statement made by US Delegate Stephen Rapp during the Rome Statute Review Conference in Kampala on 7 June 2010, at 5 (on file with author).

proposed definition of the crime of aggression.' And, '[a]lthough we respect the considerable effort that has gone into the Princeton Process, we believe that without agreed-upon understandings, the current draft definition remains flawed. We are concerned that the apparent consensus on the wording of Article 8*bis* masks sharp disagreement on particular points regarding the meaning of that language that must be addressed before the amendments on the crime of aggression can enter into force.'[543]

Even though the US rightly pointed out that the Review Conference was moving towards adopting a definition that retained existing differences of perspectives, they also argued that these disagreements would be overcome if the amendment included understandings that would explain what a 'manifest' violation is, and particularly, what it is not. However, this ignores the underlying problem as much as inclusion of the term 'manifest' did in the first place: how can states agree on an *understanding* on what 'manifest' means, when they do not agree on what *manifest* means? State practice, for example, on Russia's role in destabilizing pro-European or pro-NATO Eastern European states, on whether or not to intervene in situations such as Syria, Darfur and Burma, on whether or not the wars in Iraq and Afghanistan were legal, illegal but legitimate, or aggressive, on when, exactly, an anticipatory resort to force to eliminate a looming danger falls under the scope of self-defense, and how to interpret authorizations by the UN Security Council remind us every day about the disagreements that persist regarding how to distinguish between aggressive and non-aggressive use of force. The problem with 'manifest' as well as any 'understanding' thereof is what Jacques Derrida called 'il n'y a pas de hors-texte.'[544] If the text itself is indeterminate, any interpretation thereof is also indeterminate. There is no extra-linguistic method to determine the objective correctness of any understanding or interpretation of an indeterminate provision. Meaning is not an external notion that is 'out there' but is created by the interpretation of a text. It follows that in the absence of a meta-criterion that guides a mutual understanding of what the aggression definition 'means,' there is no method of convincing someone that disagrees with a particular interpretation by referring to the equivalence of the contested interpretation with that provision's 'real' extra-conceptual meaning.[545]

The crime of aggression thus does very little to overcome the fundamental disagreement on what 'aggression' means. The project that became a campaign for agreement-as-an-end-in-itself produced an open norm that recognizes the emptiness of its underlying values. It reflects and acknowledges the limitations of where agreement lies, that agreement on the core of the matter is not going to be resolved at the diplomatic level, that these disagreements can best be masked so that no one will oppose the text of the provision, while the problem is delegated to judges. For a judge,

[543] Statement made by US Delegate Harold Koh during the Rome Statute Review Conference in Kampala on 4 June 2010, at 3 (on file with author).
[544] Jacques Derrida, *Of Grammatology* (Johns Hopkins University Press, 1976), at 158.
[545] See for a more elaborate discussion on the problem of language with the interpretation of ideas, Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, 2005), at 527-532.

however, this is a daunting prospect. By training and professional ideology, judges, in criminal law above all, strive to find pre-existing rules and to follow those rules impartially, rather than construe the entire content of the rules themselves. This is not to say that judges do not reinterpret such rules as they go along, within certain limits of possibility, to find what they find a more equitable outcome. Nevertheless, a judge will do so or argue to do so on the basis of rules that exist, and/or in light of meta-criteria that provide support for what to prioritize and what values matter most. For a criminal law rule to be followed, it must exist. It must have been there before the conduct took place, and be clearly prescribed, for it to be in line with the principle of legality that lies at the core of criminal law. But the existence of a rule presupposes agreement. They are exclusive: rules either oblige or they do not.[546] Even though the exhortation to 'have faith in judges' implies respect for their capabilities, in fact it asks the judge to form law in an area that is highly contested and for which a 'wrong' rule on what aggression is has the highest of consequences, without much external guidance on how to do so. Moreover, it asks judges to present their decisions in the form of legal conclusions, made on the basis of pre-existing norms, so as not to facilitate critique of the 'legality' of the ruling.

Luis-Moreno Ocampo, then-Chief Prosecutor of the ICC, recognized this absence of agreement on matters of international criminal law when he stated in the documentary '*The Reckoning*' that '[t]he problem is, when you are a prosecutor in a national system, there is consensus on the law. This idea to have international criminal law is so new, that there is not a consensus in the world. And that is why a prosecutor has a different role. We have to use our case to build consensus.'[547] Indeed, Ocampo asserts that he believes that the task of the independent and chief Prosecutor of the ICC entails the *construction* of consensus, rather than the *implementation* of rules made by consensus. Rather than codifying socio-political ideals on justice and order, international criminal justice, as envisioned by Ocampo, construes the law in a way that *creates* socio-political ideals.[548]

What is a judge to do in this context? On the one hand, he or she is forced to make intrinsically political decisions between differing views of the world and the function of war. But the judge has to do so without much external guidance, in the form of a meta-criterion that provides support in grasping what to prioritize, since a coherent conceptualization of the contemporary use of force system is absent. Instead, the judge is directed in contradictory ways by the hodgepodge of underlying assumptions that undergird the notion of aggression. Since reality is not as abstract and predictable as mechanical rule-applying would require, and the notion of aggression is

[546] Judith Shklar, *Legalism. Law, Morals, and Political Trials* (Harvard University Press, 1964), at 104-105.
[547] Skylight Pictures, *The Reckoning. The Battle for the International Criminal Court* (available at http://vimeo.com/9160246) at 00.16.35–00.16.57.
[548] See for an insightful collection of essays on judicial (pro-)activity at the international criminal tribunals Shane Darcy & Joseph Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press, 2010).

indeterminate and leaves it to the judge to decide in concrete cases what aggression exactly is, deciding a legal opinion relies on judges' political choice.

On the other hand, a judge is not allowed to appear (too) political either. If he or she exercises her discretion 'too far' and formulates her views into rules that, in the words of Duncan Kennedy, seem to achieve 'extradiscursive political objectives,' the judge will be criticized for being disloyal and politicizing the institution.[549] A judge therefore needs to make sure that when presenting in a judgment or opinion the choices that are made to decide the case are translated into legal language: using legal reasoning, buttressed by legal sources, providing conclusions on how conflicting norms should be weighed against each other, which facts are relevant or not, which criteria are applicable, and in what way. As a legal opinion cannot *appear* to be the political choice that it inherently entails in more or lesser ways, it needs to at least look like a legal reasoning and be supported by legal sources to be recognized as valid and persuasive. Law's disciplining power provides the outer limit to this exercise, for the only choices that are available to a judge are those that *can* be translated into sound *legal* reasoning and for which legal sources are at least available. This often by no means limits the judge to one, 'true' outcome, but it does narrow its choices to what is recognized in the legal paradigm, excluding what is not. Yet it also includes what *can be* recognized as a legal reasoning, because law is generalizing and thus disciplines in both directions.

Given this paradox in which a judge needs to maneuver, in what way is an ICC judge it to make the choices it will be facing when a contentious aggression case emerges in its courtroom? A first option is if the judge is in fact asked to carefully try to make a decision based on *his or her own* ideological views of where the line should be drawn between a legitimate war and an aggressive war? In this way, each judge brings its own ideology, and the outcome will reflect the ideology that happens to be conjoined in the sitting bench of judges over the case at hand. There would be an obvious tension with the legality principle, since there is no way of knowing what ideology will adjudicate a case when the use of force is considered, and thus not predictable whether the coin falls on finding the force heroic or supremely criminal, or in lesser extreme, a manifest violation of the UN Charter or not, or justifiable or not. A first option is thus based on the idea of asking the judges to reason in accordance with their own ideology, worldview, assumptions on what is just and necessary, and on what actions contribute best to achieving the purposes of the UN Charter, and see where that brings us. Yet, importantly, to prevent attacks on the integrity of the Court, such decisions would then be subsequently written in the legal language, invoking legal arguments, in order to claim correspondence to the legality principle that is foundational to criminal proceedings.

[549]Duncan Kennedy, *A Critique of Adjudication. {Fin De Siècle}* (Harvard University Press, 1997), at 370.

Instead, a second option may lie in presuming that, following Dworkin's Hercules, an ICC judge can *find* a grand political theory behind the 'system of international law' according to which she can come to *the one right answer*. Dworkin posited that if the law is properly interpreted, it will give an answer. Not everyone will arrive at the same answer: Dworkin acknowledged that there is contention on what is 'right.' But such a right answer does exist, according to Dworkin, However, only an 'ideal judge' (who he names 'Hercules' after the Greek mythical hero) who is exceedingly wise, perceptive, analytically superior and with plenty of time can discover a political community's grand political theory that provides the true answer to what law provides. Whether the institutional parameters of the ICC allow any judge to operate as an ideal Hercules would need to operate in order to find such answers through semi-sociological research is doubtful at best, if such an ideal judge would even exist. But, more fundamentally, the existence of such a grand theory, if at all existing for any society, will be impossible to find until and unless 'humanity' forms a political community, based on shared ideas, values, aims and norms.

A third option then might be to ask the ICC judge to do neither of the above and instead adjudicate on the basis of what the judge finds fair and be *transparent* and honest about it rather than veil it in legal language. Since the question of the legitimacy of war is so engrained with political choice, to adjudicate in a sensible manner may include acknowledgement and transparency of what the nature of this decision-making entails rather than concealing it with slogans of delivering universal justice, ending impunity and the like. The question does not become less political if re-labeled as an abstract and clear legal norm, and it does not become less fundamental if it is put before a judge to decide on. Yet, even though all judicial decision-making relies to certain extent at least on equity reasoning, adjudicators are not allowed to own up to their own subjective assessments of fairness as a basis of their ruling, but are required to find legal rules that support their decision in order to uphold the claim that justice is served by proclaiming what the law provides: in the one and true meaning.

Perhaps none of this matters much in practice though, one could argue, because it is not so important what the judges will actually say since no-one really believes that there will be any case that will be adjudicated anyway, and all this defining and expanding the jurisdiction is just for show. Or less cynical, for the expressive effect of the 'norm' and not to be enforced and adjudicated. The expressive effect of norm production, as a means to jointly express a rejection of aggressive use of force, whatever its exact meaning, might in fact be a more important beneficial function for the crime of aggression than the aim of using the norm and the institutionalization it comes with to adjudicate. According to the theory of the expressivist function of law, the regulation and criminalization of aggression is believed to contribute to a shared understanding of what is acceptable behavior in society and what is criminal, hoping to help articulate through this expression the shared rejection that exists against aggression.

But if it does come to adjudication, the crime of aggression brings fundamental challenges to an adjudicator's courtroom and deliberation room.[550] The question whether law is able to resolve the disagreement on the question of the legitimacy of force and help prevent and suppress use of force is dismissed in the sheer desire to believe in progress; a progress embodied by the crime of aggression as the capstone achievement in the development of international criminal justice.

For a sensible application of law to war it seems that an intellectually honest appreciation of the abilities of (criminal) law may well be needed. Just because it is termed law and is expressed in terms of justice and applied by judges does not mean that fundamental disagreement is overcome and assessments on the aggressiveness of force have become any easier, nor will it be until our ceasing to be different from one another and ceasing to live together in a moral plurality. If addressing aggression in the legal realm is nevertheless preferred, it should rather be acknowledged that, essentially, to bring an aggression case (unless it is an adamantly obvious aggression without any credible and reasonable justification) before a court means to ask from a panel of judges a decision of whose interpretation of the legitimacy of this particular use of force is most persuasive, taking all things into consideration. Judges are asked to choose, but without guiding them on which basis; on the basis of equity, morality, their sense of justice, ideas of necessity?

To use criminal law to address the legitimacy of war requires an appreciation of the abilities and limitations of the type of (criminal) law that the crime of aggression creates, in order to raise realistic expectations and enable a possibility of serving justice and upholding the credibility of the ICC. It should not be concealed behind the fiction of the universality of either claim for or against aggression, of the idea that only one answer can be the right one, only one side can have resorted to force legitimately, and only one, if any, can represent the 'good,' making the other by default the bad.

However, 'the train has left the station,' was a response heard in Kampala more than once if I asked the simple question of why – meaning: for what reasons – international criminal law was employed to the notion of aggression. And I received similar responses when I would ask whether (international) law was apt to deal with the topic of war and use of force. The general sentiment in Kampala was clear: the train had left the station, meaning, 'we' decided long time ago (probably referring to Nuremberg) that war is bad, unless 'we' think it is good, and therefore those making war that 'we' think is bad, are criminals. And 'we' are very smart lawyers, so 'we' will be able to come up with abstract legal rules that will guide the judges at the ICC just enough to use it to prosecute leaders of rogue nations that make war against 'our' interests.

[550] Beyond the issues with establishing the *actus reus*, there is also a fundamental problem with not only proving *mens rea* (intent) but actually finding *mens rea* if the disagreement on the legitimacy of the resort to force is fundamental. See for a discussion of the protracted debates on the intent-criterion during process leading to the 1974 Definition of Aggression, Julius Stone, *Conflict through Consensus: United Nations Approaches to Aggression* (Johns Hopkins University Press, 1977), at 40-57.

6.4 The Purpose of Punishing the Aggressor: Prevention, Retribution, Incapacitation and Expressing Right and Wrong

Being as it may, what then is the idea of punishing aggressors imagined to contribute to the goals of maintaining international peace and security, suppressing aggressive war, bringing justice for those affected by aggression and ending impunity for those that have committed it? If indeed prevention and/or retribution for aggression can be achieved, or if instead other theories of punishment come to fruition in adjudicating aggression, some of the tensions and challenges that are discussed in this book may be of less import. This section continues the discussion of the previous chapter with regard to the punishment rationales of prevention and retribution, and with a discussion of Justice Röling's argument that retribution and prevention do not apply for the crime of aggression but that the purpose of punishing aggressors lie in the importance to remove such individuals from power. The section finishes with a discussion on expressivism, the didactic function of the trial and the function of history telling and didactic purposes.

As was observed in Chapter 5, most fundamentally, the tension between criminal law and the question of the aggressiveness of war lies in criminal law's inherent vertical relation between the law-enforcer and the criminal and its presumption of the ability to distinguish good from bad and the crime of aggression's promise to be a norm between equals, promising all to be free from another's aggression and at the same time free to resort to force when for the 'good.' In accordance with criminal law's vertical relation, the law-enforcer acts on behalf of society and is empowered to use means not available to the criminal, in order to stop the commission of crimes and punish the perpetrator(s) for it. The criminal, on the other hand, is the outcast of society and has forfeited his or her right not to be subjected by these coercive measures by knowingly and willingly acting in criminal ways. This vertical relationship is typically embodied by an acceptance of this difference in means. But due to the flimsiness of the distinction between legitimate and aggressive use of force, the justification for this verticality becomes dubious.

This verticality is justified by a belief that the crime of aggression will bring positive effects to international relations and the strive for global justice. But what is the crime of aggression's potential in achieving the ambitious aims with which the international criminal justice project associates itself? It is difficult to predict with any authority what the exact effects of the crime of aggression will be in the future, and thus what potential the crime of aggression has for achieving aims of peace and security, stability, and human rights interests, and purposes that (international) criminal law is traditionally associated with, such as prevention and deterrence, retribution, history telling and expressing shared morality on right and wrong. In order to imagine what the crime of aggression can be and do, this section draws from literature that analyzes

the punishment rationales for other international crimes and combines these with the analysis that is deduced from the use of force and aggression discourses.

6.4.1 Prevention

Preventive theories of punishment seek justification of punishment in the possibility of preventing future crimes by means of general or special prevention.[551] Punishment for prevention is aimed at the future rather than the past conduct. It is aimed at preventing others to commit crimes (general prevention), such as by deterrence, and at preventing the same offender to commit more crimes in the future (special prevention). Preventive theories of punishment follow a consequentialist moral philosophy, understanding the moral value of the act (both crime and punishment) in terms of its societal consequences. It is moreover utilitarian for justifying the infliction of punishment on a few when required for achieving the greatest possible happiness by the greatest number of people involved. The ultimate goal for punishment of an individual is not the retributive rationale of restituting the wrong that was committed but to decrease crime in the future. This preventive utilitarian justification of punishment is therefore less focused on the criminality and blameworthiness of the committed crime and redressing the wrong inflicted, but instead on the consequences of the committed crime and preventing such consequences from occurring again, by aiming at diminishing the risk of future crime.

From analyzing the international criminal justice project for its potential in achieving utilitarian theories of prevention, Immi Tallgren concluded that whatever logical inconsistencies, behavioral uncertainties, or practical difficulties national systems face with 'ordinary' criminality, trying to fit these theories to the international criminal justice system 'multiplies them exponentially.'[552] She holds that '[t]he basic pre-conditions for the effectiveness of the mechanisms according to the prevailing theories either do not exist or remain unfulfilled. The efforts to make them fit any current empirical examples seem out of place, artificial, even ridiculous, falling into

[551] The preventive and deterrence theory of punishment was originally developed in the 18th century by Jeremy Bentham and Cesare Beccaria. They focused on the threat of formal punishment, in the sense of penalties that are applied by legal authorities, such as the state. Modern deterrence theory has expanded this notion to include also the preventive effect of other types of sanction threats, such as the threat of social censure, the fear of public embarrassment, and self-imposed sanctions, such as shame and feeling guilt, see L. S. Anderson, et al., 'Formal and Informal Sanctions: A Comparison of Deterrent Effects' (1977) 25 *Social Problems* 103-112, H. G. Grasmick & R. J. Bursik, Jr, 'Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model' (1990) 24 *Law & Society Review* 837–862, H. G. Grasmick, et al., 'Reduction in Drunk Driving as a Response to Increased Threats of Shame, Embarrassment, and Legal Sanctions' (1993) 31 *Criminology* 41–67. See for discussions on the preventive function of punishment also Johannes Bratt Andenaes, *Punishment and Deterrence* (University of Michigan Press, 1974) and Franklin E. Zimring & Gordon J. Hawkins, *Deterrence* (University of Chicago Press, 1973).

[552] Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *European Journal of International Law* 561-595, at 590.

the fictive, rhetorical universe of international speech situations.'[553] She puts forward that two conclusions could follow from this: either the model mechanisms for utilitarian criminal law are false (the theories are false); or the way in which the international criminal justice field functions is difficult to reconcile with these theories and thus difficult to justify with utilitarian arguments.

With respect to the crime of aggression, utilitarian theories that justify the criminalization of aggression by pointing to its preventative potential are likely to face similar problems as Tallgren identified for the wider international criminal justice project. First, special prevention is likely usually unnecessary as the sentence of those convicted for aggression shall probably incapacitate the previous offender from repeating its crimes in the future. But if such offender does get released before he (or she) is too old to govern and indeed regains a position in which he may control over or direct the political or military action of his state, deterrence is still greatly hampered by the low probability that the threat of punishment is realized and an alleged aggressor needs to answer for his or her behavior at the ICC. The ICC can only prosecute very few cases compared to the alleged criminality that occurs worldwide, and its ability to prosecute for the crime of aggression is moreover severely limited by additional procedural limitations, such as the opt-out clause. The special preventive function of the crime of aggression appears therefore limited.[554]

Second, general prevention is likely to be problematic not only because of this unlikelihood of actually being subjected to a trial, but also because it presumes that state leaders will be led to not resort to force because the ICC has adopted the crime of aggression. It relies on a dubious presumption that much (if any) force is resorted to without the conviction that this force is just and/or necessary for humanitarian or defensive purposes. As was argued throughout this book, it is instead more likely that a state leader engages in what could be perceived as aggression with the persuasion that this use of force is legal or at least legitimate, because it responded to a violated right or was necessary for one or another essential value. Given the intensity of the

[553] Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *European Journal of International Law* 561-595, at 590.

[554] See for example, Mirjan Damaška, 'What Is the Point of International Criminal Justice?' (2008) 83 *Chicago Kent Law Review* 329-368, at 344-345. See also Immi Tallgren, who observes that the deterrent and preventive effect of international criminal law is not convincingly demonstrated in any empirical study, nor by any logical extrapolation. The idea that those engaged in the crimes that fall within the scope of international criminal law will be deterred and prevented from committing such crimes by the very small chance that an international criminal tribunal will take interest and gather sufficient evidence to prosecute is widely recognized as problematic, she holds. See Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *European Journal of International Law* 561-595. In contrast, Harmon and Gaynor argue that 'there is some evidence that the international justice system is forcing western military commanders to listen more closely to their legal advisers when selecting targets and weapons for bombing missions.' Mark Harmon & Fergal Gaynor, 'Ordinary Sentences for Extraordinary Crimes' (2007) 5 *Journal of International Criminal Justice* 683-712, at 695. Critical discussions of the punishment rationales are also provided by, for instance, Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press, 2007); and Mirko Bagaric & John Morss, 'International Sentencing Law: In Search of a Justification and Coherent Framework' (2006) 6 *International Criminal Law Review* 191-255.

consequences of not resorting to force when a state leader is convinced that it must, the preventive effect of the crime of aggression appears therefore limited from its outset. Moreover, deterrence research has found that there is evidence of a link between the certainty of punishment and crime rates, which is extremely low in case of aggression due to the difficulty for the ICC to obtain jurisdiction, but considerably weaker evidence of a link between the severity of sentences and crime rates.[555] Extrapolating to the crime of aggression suggests that even though there may be a long prison sentence awaiting those that are convicted, there is little evidence that this has deterrent effects.

However, when it comes to humanitarian intervention without Security Council authorization, and thus when it comes to resorting to force for other reasons than one's *own* justice and/or safety, it may indeed have the effect of deterring states from joining such operations. If military force is to be used for other than one's own interests, this may allow a different kind of deliberation and cost-benefit analysis before deciding to resort to force or not. The calculation of the costs of such undertaking (in actual expenses, in loss of life and material, in domestic political support, and in diplomatic standing) may well change with the idea of being accused of committing aggression. Consequently, it may become more appealing to excuse one's participation in such a venture by referencing the potential accusation of committing aggression, and it may also well provide the way out without losing face if a state wants to keep out of an interventionist coalition.[556]

Whether or not some state leaders will be deterred from using aggressive force or whether the crime of aggression has other preventive effects vis-à-vis other potential aggressors, prosecuting with the aim to prevent others from committing aggression, and thus with utilitarian reasoning for punishment, is problematic as such because it aims at delivering 'exemplary justice.' This suggests the using of a person as a means to an end, rather than punishing him for what he has done and thus making him the object of punishment. It also challenges the notion of equality before the law as the measure of punishment is decided on the basis of its effect in society rather than based on the criminal conduct.[557]

6.4.2 Retribution

[555] Maguire, Morgan & Reiner (eds.), . See also A. Bottoms & A. Von Hirsch, 'The Crime Preventive Impact of Penal Sanctions', in Cane & Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2011), and A. Doob & C. Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice: a Review of Research* 143.
[556] See for this argument for instance Noah Weisbord, 'Prosecuting Aggression' (2008) 49 *Harvard International Law Journal* 161-220.
[557] Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *European Journal of International Law* 561-595, at 592.

Rather than for prevention, the crime of aggression could also be valuable for its retributive effect. According to the theory of retribution, punishment is justified as a reckoning for the committed wrong. Retributivism therefore justifies the punishment in relation to the committed wrong, which needs to be addressed, vindicated and redressed by punishing the perpetrator. The aim is to provide redress for the victims of the crime and society at large, to strive for justice, and (thereby) maintain order in society. Antonio Cassese explains the retributive rationale as follows: '*justice dissipates the call for revenge*, because when the Court metes out to the perpetrator his just deserts, then the victims' call for retribution are met.'[558] Therefore, the reasoning for justifying crime of aggression trials for its retributive value is that by holding offenders accountable for violating society's norms, society aims to mitigate the incentive for revenge on an inter-personal level, and afflict punishment only for conduct that was criminalized prior to the behavior taking place, and in accordance with prescribed procedures.[559]

Problems with justifying the punishment of aggressors on this basis include that prosecutions through the ICC could never be sufficiently vengeful to have any true retributive effect for victims from aggressive wars and thoroughly destabilized post-war states; that summary execution or other types of eye-for-an-eye-punishments is the only appropriate punishment, as we saw similarly argued by Churchill and Nikitchenko in setting up the Nuremberg Tribunal;[560] and that those committing aggressive war would have relinquished the right to argue their case in judicial proceedings.[561] Moreover, Stuart Beresford argues that retributive sentiments should play only a slight role in international criminal trials since they may prove counter-productive and disruptive to the restoration and maintenance of peace.[562] Harmon and Gaynor add to this, writing on the ICTY but applicable to the wider punishment practice of international criminal law, that '[t]he startling disparity between sentences meted out at the ICTY for murdering a human being and sentences meted out in domestic jurisdictions for the same conduct' make the application of the concept of retribution in cases of large-scale crimes and mass atrocities unsatisfactory.[563]

In discussing the Eichmann trial in Jerusalem, Hannah Arendt wrote: 'We refuse, and consider as barbaric, the propositions "that a great crime offends nature, so that the very earth cries out for vengeance; that evil violates a natural harmony which only

[558] Antonio Cassese, 'Reflections on International Criminal Justice' (1998) 61 *The Modern Law Review* 1-10, at 6.
[559] See for an argument that international sentencing should be based on retributive considerations rather than prevention or expressivist aspirations, Jens Ohlin, 'Towards a Unique Theory of International Sentencing', in Göran Sluiter & Sergey Vasiliev (eds.), *International Criminal Procedure: Towards a Coherent Body of Law*(Cameron May, 2009), pp. 373-404, at .
[560] See Sections 4.1.1 and 5.1.
[561] See for a further discussion, Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 21.
[562] Stuart Beresford, 'Unshackling the Paper Tiger - the Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2001) 1 *International Criminal Law Review* 33-90.
[563] Mark Harmon & Fergal Gaynor, 'Ordinary Sentences for Extraordinary Crimes' (2007) 5 *Journal of International Criminal Justice* 683-712, at 692.

retribution can restore; that a wronged collectivity owes a duty to the moral order to punish the criminal" (Yosal Rogat). And yet I think it is undeniable that it was precisely on the ground of these long-forgotten propositions that Eichmann was brought to justice to begin with, and that they were, in fact, the supreme justification for the death penalty.'[564] Retribution feels barbaric to some, yet an undeniable aspect of the administering of international criminal law in reality. Arendt leaves us thereby to ponder over the relationship between law and crime and whether there is a way in which law can be applied in a manner that matches with the crimes that occur in situations of mass-violence.[565] They are questions that remain fundamental for the entire exercise of international criminal justice.

Punishing an individual through an international criminal trial cannot come close to measuring up to the significance and intensity of the tragedy that it tries to address. A trial's retributive value appears of limited satisfaction then anyway.[566] The scale and gravity of the occurrences for which international criminal trials are held cannot be remedied by sentencing a small number of individuals to prison. Nor would a prison sentence (nor a death sentence of one if that would have been available to the ICC) likely redress the enormity of the crime that the individual is held responsible for.[567]

However, one often hears the suggestion that through accountability for aggression, the value of retribution supports the building of peace, often accompanied by the assumption that there can be no (sustainable) peace without justice.[568] One of the ongoing debates in international criminal justice is that of the achievement of both peace and justice that is often represented in catchphrases such as 'peace *versus* justice,' 'peace *and* justice' and '*no* peace *without* justice.' The debate usually revolves around the question whether 'peace' is attainable without criminal accountability, which is referred to as 'justice.'[569] One side in this debate argues that without criminal accountability redress for victims and the setting of a historic record to remember what occurred and who is responsible for it, a sustainable peace cannot be achieved. They therefore argue against negotiated settlement with those that have

[564] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books, 2006), at 254

[565] David Luban, 'Hannah Arendt as a Theorist of International Criminal Law' (2011) 11 *International Criminal Law Review* 621-641.

[566] See for this also Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books, 2006).

[567] See for this observation with regard to the Eichmann trial, Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook for United Nations Law* 1-36, at 3.

[568] See for a discussion on the role of accountability mechanisms in peace negotiations and peace-building and on how such mechanisms are often ill-applied and thereby undermine the peace process, Paul R. Williams & Michael P. Scharf, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia* (Rowman & Littlefield Publishers, 2002).

[569] See for a discussion on how the meaning of the terms 'justice' and of 'peace' in the practice and advocacy in and around the ICC is continuously moved between contradicting justifications for the international criminal justice project, Sarah Nouwen, 'Justifying Justice', in James Crawford & Martti Koskenniemi (eds.), *The Cambridge Companion to International Law*(Cambridge University Press, 2012), pp. 327-351, at . She argues that the Prosecution flips between different understandings of 'justice' and 'peace' to deal with the tensions it faces in its narrative that the ' ICC equals justice.'

allegedly committed international crimes and amnesties.[570] Critics of this view hold that peace is a complex and difficult process that requires leaders to join the negotiations. If they know that the only available option is a single ticket to The Hague, they will not join the negotiation table and the conflict prolongs, the reasoning goes.[571]

Without wishing to diminish the importance of both peace and justice for any society, unfortunately, the term 'justice' is often used in a too simplistic manner, ignoring the complexity of what justice represents, that it means different things for different people, and the different manners in which justice is strived after in different societies, depending on each society's socio-political identity, norms and values, customs and ideals. Notwithstanding the importance of criminal accountability for many situations, to reduce the ideal of 'justice' to that of criminal accountability, and to translate this into bringing a small number of leaders that are held to be most responsible for the commission of international crimes before an international criminal court or tribunal, neglects that striving after reconciliation, stability and order are all tightly interrelated with a number of different strategies.[572] This may include accountability measures, including but not limited to criminal accountability, but also other reconciliatory measures. They jointly aim and are part of the aspiration to create an environment in which people can move forward with their lives, trying to leave the past behind, and build on a new future, for themselves, their community and the larger society.

This sometimes means that in certain situations, criminal justice, although perhaps still an ideal, is placed lower on the priority list than other measures that are taken to end conflict and rebuild society. The idea that no peace is possible without justice in

[570] For example, Antonio Cassese understands accountability as a means to of achieving peace, in Antonio Cassese, 'Reflections on International Criminal Justice' (1998) 61 *The Modern Law Review* 1-10, at 8-9; and Cherif Bassiouni wrote 'Impunity for international crimes and for systematic and widespread violations of fundamental human rights is a betrayal of our human solidarity with the victims of conflicts to whom we owe a duty of justice, remembrance, and compensation. To remember and to bring perpetrators to justice is a duty we also owe to our own humanity and to the prevention of future victimization' in Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 *Law and Contemporary Problems* 9-28, at 27.

[571] Snyder and Vinjamuri, for example, demonstrate that trials for crimes in the former Yugoslavia and Central Africa 'have utterly failed to deter subsequent abuses.' The argue that instead, amnesties and truth commissions succeed largely because they solicit cooperation from powerful actors with vested interests in the outcome, Jack Snyder & Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2003/04) 28 *International Security* 5-44. Nick Grono and Adam O'Brien argue that it is disingenuous to suggest that it is always possible to further the interests of peace and justice simultaneously. The reality of peacemaking, they argue, shows that difficult choices must sometimes be made between justice and peace objectives, Nick Grono & Adam O'Brien, 'Justice in Conflict? The Icc and Peace Processes', in Nicholas Waddell & Phil Clark (eds.), *Courting Conflict? Justice, Peace and the Icc in Africa*(The Royal African Society, pp. 13-20, at . For the argument that amnesties should be regarded more nuanced than necessarily creating a culture of impunity and neglecting the needs of victims, see also Joris Van Wijk, 'Should We Ever Say Never? Arguments against Granting Amnesty Tested', in R. et al Letschert (ed.), *Victimological Approaches to International Crimes*(Intersentia, 2011), pp. 289-314, at .

[572] See for this argument also Sarah Nouwen & Wouter Werner, 'Monopolizing Global Justice. International Criminal Law as Challenge to Human Diversity' (2015) *Journal of International Criminal Justice* 157-176.

the form of the particular manner in which the ICC holds a small number of individuals accountable (if at all and ever) in at the very minimum about 5-10 years ahead, should the Court be able to arrest them, is hardly conducive to the ideal of a global environment in which victims and perpetrators get 'justice.' Instead of imposing one particular kind of justice, the ideal of global justice seems rather more appropriate as an ideal of assisting societies globally in their difficult challenges in ending conflict and (re)building society, trying to support them to take away the root causes of that conflict to prevent renewed outbreaks of violence, and seeking stability as well as justice for those that have become victim of the violence. This is, however, such a broad and encompassing project that it seems hardly achievable. But signals that ICC intervention prolongs conflict and neglect or counter the needs of victims should at least lead to careful consideration whether the way in which 'justice' is equaled with the ICC and the way in which the ICC functions in practice should be reconceptualized.

6.4.3 Incapacitation

Rather than for prevention and retribution, aggression is sometimes also regarded as a problem for which the function of criminal law should be seen as a societal risk-preventing mechanism through which potentially dangerous individuals can be removed from society. Like prevention, incapacitation is a utilitarian justification of punishment. Incapacitation does not focus on what has been done but punishes people for what they might do in the future.

In his dissenting opinion at the Tokyo Tribunal, Justice Röling criticized the retributivist or preventative justifications for the crime of aggression. Moreover, he asserted that the alleged aggression of the Japanese leaders was not actually criminal or blameworthy. He therefore suggested that the rationale and justification for punishing them lay in the risk they posed to society, which needed to be addressed.[573] He draws comparison with Napoleon's being banned to St Helena because he posed a threat to peace, and the victorious powers that sent him there wanted to enforce the peace.[574] Napoleon was removed from Europe 'comme ennemi et perturbateur du repos du monde', as a source of potential unrest against whom were taken 'les mesures de précaution, que le repos et le salut public peuvent exiger à son egard', as was included in a protocol of the Congress of Aix-la-Chapelle in 1818.[575] According to Röling, what was thus done through political action vis-à-vis Napoleon was attempted through judicial action against Kaiser Wilhelm II after WWI, on the basis

[573] Tokyo Tribunal, Dissenting Opinion Justice Röling.
[574] B.V.A. Röling, *Strafbaarheid Van De Agressieve Oorlog* (Wolters, 1950), at 11.
[575] B.V.A. Röling, *Strafbaarheid Van De Agressieve Oorlog* (Wolters, 1950), at 27-28. In English translation, the protocol provided that Napoleon was removed from Europe as enemy and disturber of the world's rest and was a source of potential unrest against whom precautionary measures were taken that the public peace and safety may require against him.

of Article 227 of the Treaty of Versailles. Röling argued that the Nuremberg and Tokyo Courts judged in similar vein. Through procedure, a small group of leading aggressors were defused by conviction and punishment for aggression.[576]

As such, Röling imposed a 'necessity'-based standard (focusing on the danger the individual poses for society), rather than the 'justice'-reasoning his colleagues had in the majority opinion (focusing on the criminality and blameworthiness of the acts and person and thus on the rights that are violated). In his inaugural lecture, accepting his professorship in Groningen in 1950, Röling warned for the danger of invoking a general feeling that the criminality of aggression is self-evident, of invoking that a global consciousness would be harmed, of invoking a general sense of justice, and of invoking natural law to condemn aggression.[577] He raised the question whether it is aggression proper that is rejected, or whether only the aggression of others is rejected. He thereby pointed to the fact that every country honors their military heroes with statues, anthems, and other symbols, for acts that leaders of Germany and Japan were convicted for in Nuremberg and Tokyo as having perpetrated aggression. He thereby suggested that notions like 'natural law' and 'a sense of justice' provide dangerous guidance when it comes to aggression.[578] The word 'criminality' can be used for many purposes, Röling argued, and when it comes to the crime of aggression, judgments infer from the idea of political offense, in which the idea of enmity transcends that of criminality or blameworthiness, and where punishment therefore is not so much retributivist but a measure against a danger. According to Röling, an aggression trial is about elimination, about defusing a danger, rather than retribution for the 'supreme crime.'[579]

Röling thereby invoked the Schmittian friend-enemy antithesis as characterization of the political. Rather than understanding the crime of aggression as a crime for the blameworthiness of committing aggressive war, which Röling argued in his dissenting opinion violated the principle of non-retroactivity, he found instead that the crime of aggression should be understood as the right of a victor to create legality as it befits him. Contrary to the crime of aggression as the majority at the Tokyo and Nuremberg Tribunals constructed, such an understanding of the crime of aggression would actually be a codification of existing customary law, and thus not a violation of non-retroactivity, Röling submitted. This offense doesn't regard the perpetrator as criminal but as enemy, the purpose of the trial and punishment being to eradicate danger rather than address culpability, and the sanction to be understood as a security measure rather than punishment.[580]

According to Röling, rather than retribution and prevention, the crime of aggression could and should be an instrument of punishing individuals that are undesirable

[576] B.V.A. Röling, *Strafbaarheid Van De Agressieve Oorlog* (Wolters, 1950), at 27-28.
[577] B.V.A. Röling, *Strafbaarheid Van De Agressieve Oorlog* (Wolters, 1950), at 5-6.
[578] B.V.A. Röling, *Strafbaarheid Van De Agressieve Oorlog* (Wolters, 1950), at 7.
[579] B.V.A. Röling, *Strafbaarheid Van De Agressieve Oorlog* (Wolters, 1950), at 26.
[580] B.V.A. Röling, *Strafbaarheid Van De Agressieve Oorlog* (Wolters, 1950), at 28.

elements to society, for posing a danger to society or humanity. The justification for the crime of aggression does not lie in the conduct's blameworthiness but in enabling authorities to manage or eliminate risks on the basis of lower evidentiary standards (on the basis of 'risk' or 'threat' assessments rather than establishing 'beyond reasonable doubt' both '*actus reus*' and '*mens rea*'). This is not entirely foreign to criminal law systems. Mentally insane individuals that pose a threat to society are often detained without necessarily having conducted criminality. However, extensive review mechanisms are usually then positioned to ensure as much as possible a fair procedure to diminish the risk that individuals are detained without the necessity and justification of it.

Whether such a criminal law system would be desirable is an entirely different question and it is by no means argued here that the crime of aggression should be reconceptualized as measure to eradicate state leaders that may pose a threat in the future. It would prove a useful tool in the policing of the world by the powerful few, enriched by the crime of aggression and the ICC's institutional framework as an instrument to tackle the rogue. But what is sacrificed in its lee? The criminal law tradition has developed in response to and seeking to escape from authoritarianism. Victim-oriented teleological reasoning, widening the scope of the provision, enlarging interpretative leeway, limiting criminal defenses, lowering evidentiary standards, and the changing of burdens of proof may all contribute to getting an individual that poses a threat in the dock and imprisoned. However, the added value of criminal law to the instruments the international society already holds in condemning and joining forces against an aggressor, appears slim, and the collateral damage from departing from hard-fought fundamental principles may cause more harm to objectives of order, justice, peace and stability than contribute to it.

6.4.4 Expressivism, the Didactic Function of the Trial and Historical Truth Telling

What then is the function of the trial? What is the point of trying to get a case of aggression at the ICC if special and general prevention, deterrence, retribution and incapacitation seem of limited value? If such trials are significant, then this significance must be other than the conviction and punishment of those found guilty.

This leads us to another possible value for punishing aggressors. Rather than for retribution or prevention, the crime of aggression could also prove its worth with regard to the communicative or expressive function of an international criminal trial or the norm as such, and that international criminal trials are less about judging a person than about establishing the truth of what has occurred. In the expressivist rationale, the international criminal trial serves to record 'the truth' and declare it to

the world.[581] Mark Drumbl explains expressivism as aimed at strengthening 'faith in rule of law among the general public, as opposed to simply because the perpetrator deserves it or because potential perpetrators will be deterred by it.'[582] He notes that expressivism claims as central goals the creation of historical narratives as representations of 'truth' and their pedagogical dissemination to the public.[583] The goal of punishment then is to proactively embed the normative value of law within the community.[584]

The idea behind expressivism is that actions carry meaning[585] and can 'express attitudes and send messages, quite apart from their consequences.'[586] It regards criminal trials to be less about the direct effects of punishment such as accountability and imprisonment of perpetrators but rather as a didactic means through which to communicate shared values and symbolic meanings.[587] Marlies Glasius and Tim Meijers explain that in the expressivist rationale, trials are 'supposed to be communicative spectacles that close with the infliction of shame, sanction and stigma, thus aligning crime with punishment in people's minds.'[588]

There are two communicative directions to this function. On the one hand it aims at setting or articulating values for the international society at large, and on the other it aims at those that have been affected by the crime directly. With regard to the first, Tallgren argues that there should not be a seeming need to communicate right from wrong for universally accept *mala in se* crimes. For aggression, as was noted before, it is difficult to perceive the crime to be *mala in se* if fundamental disagreement on the criminality of particular situations continues to persist in almost every use of force situation that occurs. A trial on aggression therefore appears to be more about claiming and expressing as universal a conception of where right and wrong lies than

[581] See for an analysis of the trials of the Nazi leaders, Eichman, Demjanjuk, Barbie and Zundel as show trials and how these trials tried to do justice to both to the defendants and to the history and memory of the Holocaust, Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press, 2001).
[582] Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press, 2007), at 173.
[583] Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press, 2007), at 173. See also Marlies Glasius and Tim Meijers who explain that in the expressivist rationale, the raison d'être of the trial is the crafting of historical narratives and their pedagogical dissemination to the public, in Marlies Glasius & Tim Meijers, 'Constructions of Legitimacy: The Charles Taylor Trial' (2012) *The International Journal of Transitional Justice* 1-24, at 19.
[584] Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press, 2007), at 61.
[585] Cass Sunstein famously opened his article 'On the Expressive Function of Law' by stating 'Actions are expressive; they carry meaning' in Cass R. Sunstein, 'On the Expressive Function of Law' (1996) 5 *East European Constitutional Review* 66, at 66.
[586] David Luban, 'State Criminality and the Ambition of International Criminal Law', in Tracy Isaacs & Richard Vernon (eds.), *Accountability for Collective Wrongdoing*(Cambridge University Press, 2011), pp. 61-91, at 71.
[587] See for a discussion of expressivism also Barrie Sander, The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Case of the Law (unpublished paper, on file with the author), at 2-3.
[588] Marlies Glasius & Tim Meijers, 'Constructions of Legitimacy: The Charles Taylor Trial' (2012) *The International Journal of Transitional Justice* 1-24, at 19.

that such (near) universal agreement actually exists. A trial on aggression and the norm as such then express and communicate what the system produces as right and wrong. It is a mission towards *creating* consensus, rather than an expression of what is. In this light, it is useful to remember former ICC Chief Prosecutor Ocampo's words in '*The Reckoning*.' 'The problem is,' he said, 'when you are a prosecutor in a national system, there is consensus on the law. This idea to have international criminal law is so new, that there is not a consensus in the world. And that is why a prosecutor has a different role. We have to use our case to build consensus.'[589] According to the ICC Prosecutor, it is his task to *create* socio-political consensus on what justice is and express this accordingly through prosecutions. In the absence of a shared, universal conception of where right and wrong lies and what justice is, the expressive goal of the trial becomes a persuasive or even coercive project in favor of a particular conception of justice that does not necessarily coincide with what is perceived as just for those involved.

The idea behind expressivism is that the public recognition of the injustices that occurred helps victims to recover from the trauma and restore their dignity. Moreover, in response to the tendency by perpetrators and their sympathizers to deny the occurrence of crimes, there is a desire to set the historical record straight. This is enhanced by the idea that those who do not remember the past will repeat it. Through the expressivist, didactic and historical truth-telling functions, the international criminal trial aims to enable a wider community, consisting not only of the victims, but also perpetrators, bystanders and not directly affected individuals, to recreate the conditions of viable social life.[590]

However, including historical, political and educational objectives into the trial also complicates further the already complex process of rendering justice for atrocity crimes. This was the essence of Hannah Arendt's critique on the Eichmann trial. For her, such purposes were 'ulterior' and 'can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment and to mete out due punishment.'[591] Damaška among others observed also that there is an abundance of goals that those engaging in the international criminal justice project proclaim. He observes that 'the problem of goals' of international criminal law lies in their overabundance and therefore impossibility to achieve all, the tensions that come from the incompatibility of these goals, and the competence that a judicial court has in setting an accurate historical record.[592] However, contrary to Arendt, Damaška argues

[589] Skylight Pictures, *The Reckoning. The Battle for the International Criminal Court* (available at http://vimeo.com/9160246) at 00.16.35–00.16.57.
[590] Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook for United Nations Law* 1-36, at 3-4. See also Antonio Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *European Journal of International Law* 2-17, at 9-10.
[591] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books, 2006), at 251.
[592] Mirjan Damaška, 'What Is the Point of International Criminal Justice?' (2008) 83 *Chicago Kent Law Review* 329-368, at 331-340.

that *more* priority should be given to the socio-pedagogical mission of strengthening the public sense of accountability for human rights violations, and thus the expressivist and didactic function.[593] Yet, Damaška himself points out that the interdisciplinary literature on norm acceptance through persuasion suggests that for this didactic function to work, the constituencies need to perceive those administering the trials and therefore writing the historic record and deciding whether the use of force was or was not aggression as a legitimate authority. This is more so in the international context, lacking coercive power to achieve ends with different means.[594] Rather than propagating any particular moral view, according to both Mark Osiel and Damaška a proper understanding of the didactic function would be to use trials as a 'theater for the clash of ideas.'[595]

Nevertheless, while the trial as a clash of ideas seems tempting, a didactic and expressive function relies on what the narrative is that is disseminated. This comes down to the Court's ability to set a historic record that is then expressed as guidance through which right is distinguishable from wrong, individuals are indicated as responsible, and victims are recognized in their fate. However, the trial as a means to set a historic record is problematic because it requires a contradicting rationale from that of the establishment of individualized legal accountability. Including such truth telling and educational objectives into a legal process contradicts the legal process that seeks the establishment of criminal responsibility for certain conduct. Legal and historical truths are far from identical. Where historical truth demands a widening of the context, the legal procedure seeks to reduce occurrences down to single events and tangible conduct. The wider the scope of a trial becomes, the more complex it becomes for the trial to grasp it in terms of the accountability of the individual in the dock. On the other hand, the narrower the focus, the less the trial would provide any profound historic and contextualized understanding of the situation and its structural causes and effects. There is no guarantee that an international criminal trial that is directed towards finding personal culpability necessarily leads to a presentation of historical truth. As Koskenniemi observed, it may rather be the contrary, because it may rather hamper the historical value by exonerating from responsibility larger systemic factors, such as political, social and economic structures, which provided the setting and conditions in which the conduct under scrutiny took place.[596] And this is where things become particularly problematic when it concerns aggression. Perhaps even more than already is the situation with other international crimes, the causes of war and thereby the legitimacy of use of force can rarely be reduced to the responsibility of an individual. But the criminal trial does not have the competence to

[593] Mirjan Damaška, 'What Is the Point of International Criminal Justice?' (2008) 83 *Chicago Kent Law Review* 329-368, at 343-347.
[594] Mirjan Damaška, 'What Is the Point of International Criminal Justice?' (2008) 83 *Chicago Kent Law Review* 329-368, at 345.
[595] Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (Transaction Publishers, 1997); Mirjan Damaška, 'What Is the Point of International Criminal Justice?' (2008) 83 *Chicago Kent Law Review* 329-368, at 346.
[596] Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook for United Nations Law* 1-36, at 14.

place the accusation of aggression in historical context and take into consideration facts, links and circumstances that may be crucial to understanding who is to blame for conflict.

The legal process inevitably distorts the wider context of what has occurred by reducing the facts and circumstances down to particular events that make up a particular criminal charge. Moreover, through the objective of individualizing guilt, historic reality is further distorted. International criminal trials individualize guilt because it is believed that accountability of a few individuals promotes group reconciliation while collective responsibility produces the opposite effect. The criminal trial therefore presents the perpetration of international crimes as induced by a small group of 'most responsible' while often a historically more accurate account provides that such policies enjoyed widespread popular support.[597]

It is therefore not only of limited value to the process of history telling, but counterproductive for the purpose of providing a basis for peace and reconciliation.[598] Both types of 'truths' (legal and historical) serve different purposes and focus on different factors: where a trial aims at establishing the responsibility of an individual in certain, specifically defined occurrences, history telling seeks to unravel structural causes and elements. Neither one overrides the other, but should also not be confused with one another. However, in the context of aggression, it is difficult to imagine how the legitimacy of the trial is achieved if there is no space for historic truth. As was noted above, Damaška pointed out that for a trial to have didactic value, the constituencies need to perceive the Court as a legitimate authority.

6.5 The Political Trial and the Accused

6.5.1 The Paradox of the Political Trial: Between Expressing the 'Good' and Allowing Counter-Narratives

Because preventive and retributive rationalizations about international criminal trials seem of limited power for justifying these trials, their significance is explained as political and didactic instruments setting out authoritatively how the past is to be understood, and how the new political power constellation is constituted. To certain extent, this seems to capture part of the sentiment that drove Allied powers to construe the post-WWII tribunals. And it was also a justificatory aspect for some of the stakeholders and participants in the efforts to bring the crime of aggression under the jurisdiction of the ICC. For example, Ken Anderson submitted that 'a trial (…) puts

[597] Mirjan Damaška, 'What Is the Point of International Criminal Justice?' (2008) 83 *Chicago Kent Law Review* 329-368, at 332-333.
[598] Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook for United Nations Law* 1-36.

the symbolic seal of justice on what armies have rectified with force.'[599] It is the justice of the *victor*, a reflection of the new order, the new reality. Others object against such justification for international criminal trials because the trial then sets out with a particular outcome in mind, discarding any sense of presumption of innocence. They submit that a trial should not be preoccupied with a particular outcome, but with a just process, warning that such a rationale turns criminal proceedings into political trials, and even show trials.[600] Yet, Lawrence Douglas remarked that '[t]o call Holocaust trials show trials (…) is to state the obvious. After all, that is what these trials were – orchestrations designed to show the world the facts of astonishing crimes and to demonstrate the power of law to reintroduce order into a space evacuated of legal and moral sense.'[601]

According to Koskenniemi, '[e]very trial is a show trial,' (….) 'because every trial represents a power, a hierarchy, a set of values, and preferences.'[602] In some of these 'show trials,' the accused may actually be innocent, and in some of those, Koskenniemi followed, 'it may be that the Court is guilty. And not only the Court, but the system that the Court represents.' Engaging in adjudication where the criminality of the scrutinized behavior is fundamentally contested as is the case with most situations of alleged aggression means inevitably inviting criticism of undertaking a show trial, or even, as Koskenniemi alluded to, as representing a system that is guilty, rather than the individual in the dock.

The critique on international criminal justice as inherently political is nothing new, nor is the counter-argument that international criminal trials ought to be a space cleansed from the political; a space where only law and justice matters. This 'law does and must trump politics'-logic regards the presence of the political in a courtroom as a contamination of the pursuit of justice, believing that the ideal of justice can and should be distilled from the political context in which the trial takes place. Yet, no trial and most certainly not an international criminal trial on aggression can create a vacuum in which law is purified from the political, facilitating a search for guilt and justice. However, the realist logic that holds that it is all politics and that law hardly has a place in an international criminal trial at all, is also a misperception of how international criminal trials are conducted in contemporary times. Even if impossible to understand separate from its political context, the trial proceedings follow legal procedures that seek to reduce the inequality between adversaries and they are confined to arguing on the basis of what is recognized as law. Neither of these

[599] Kenneth Anderson, 'The Rise of International Criminal Law: Intended and Unintended Consequences' (2009) 20 *European Journal of International Law* 331-358, at 337-338.
[600] Amrita Kapur, 'The Rise of International Criminal Law: Intended and Unintended Consequences: A Reply to Ken Anderson' (2009) 20 *European Journal of International Law* 1031–1041, at 1039.
[601] Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press, 2001), at 3.
[602] International Justice: Between Impunity and Showtrials, lecture by Martti Koskenniemi on 4 January 2013 at SOAS, University of London, available at https://www.youtube.com/watch?v=2QTBdPyQtEw, at 6:45.

portrayals of the relationship between law and politics in a trial captures their vastly more complex interaction in a criminal trial setting.

To certain extent, any trial is political. It involves questions of social power, legislative choice, prosecutorial discretion, and judicial interpretation.[603] International criminal trials are particularly political. A court needs to take judicial notice of at least some background facts. Because what those facts are and how they should be understood forms part of the conflict that is being adjudicated in international criminal trials and in crime of aggression trials, the court cannot avoid but taking at least some political stance.[604] Rather than a space liberated from politics, international criminal trials are spaces in which politics occur and materialize. This is not because these trials would merely reflect political forces or lack legal foundation, but because, as Gerry Simpson observed, in international criminal trials, concepts of the political are continually effectuated and endorsed as well as contested vis-à-vis each other.[605] As such, the international criminal trial is a space of contested narratives. Procedural guidelines are intended to guarantee that both contested narratives receive consideration, and in the trial's conclusion, the judicial opinion produces its own authoritative account, the ideal being that this is a product of all things considered. Yet, any engagement of the Court with these contested narratives, each claiming to represent the truth, in situations of wide-ranging international and moral significance, calls on the Court to engage with political antagonism.

In this context, the international criminal trial finds itself in a paradox. In order for a trial to be legitimate, the accused must be allowed to present its version of the truth and challenge that of the prosecution. In so doing, he may turn the trial into another attack on the victims and witnesses the trial in fact seeks to protect, allowing the accused to turn into a martyr, the trial into his podium. On this podium, he is allowed to use his speeches during trial to support revolution, countering and undermining the narrative that the powers on which the trial and the Court relies seeks to solidify. The accused may question every single aspect of this narrative for reaching the 'beyond reasonable doubt' standard. He may cast doubts on this reading, and raise credibility for the counter-narrative that was already fought and beaten on the battlefield. If the trial is conducted in a manner that presumes the innocence of the accused and aims at providing equality of arms, the trial becomes the arena to continue the struggle even after being defeated. Success for the accused in such a trial is usually not acquittal or mitigation of sentence (because he accepts that the narrative that the system produces is another than his), but reaching its audience, undermining its adversary that exerts its power through the trial, taking use of the procedure to give credence to its own narrative, and condemning the trial as political show trial. But the paradox is that if the trial would not allow for the right to speak and thus the right to turn the trial into a

[603] See for a discussion on the political nature of trials also Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 14.
[604] See for further discussion on this point Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook for United Nations Law* 1-36, at 29-30.
[605] Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 11.

spectacle, and the right to present a counter-narrative, but only endorses the narrative of those that initiated the trial, seeking to present to the public the accusation, evidence, judgment and punishment as an expressive educational and didactical medium, vindicating the wrongs that were committed, emphasizing where power lies, and displaying what is right and wrong, the trial actually *is* a show trial.[606]

Such a trial sacrifices the just process for the sake of using the international criminal justice apparatus to emphasize the moral apprehension of the behavior, condemning the loser, who finds himself in the dock, not only by the reality of being in the non-hegemonic position, but also for the purpose of publicly renouncing him as an enemy of society, an enemy of humanity, that those holding power have relieved humanity from. Where international criminal justice is used as an instrument of victors' justice, and where a trial becomes about demonstrating and educating about the wrongs of those that find themselves in the losing position, its structural underpinnings reproduce the hegemonic narrative that serves to justify the actions of those exerting power. This hegemonic, but usually deeply contested narrative, serves to tell a history. But it is the historic narrative of one, and not the other. The international criminal trial aims to solidify the authoritativeness of the hegemonic narrative and to depreciate or annihilate the counter-narrative, but lack the legitimacy among those that were not on the hegemonic side to begin with, to hold any persuasive power.

Those that contest this narrative but are confronted with the power structures that support the production of international criminal justice's outcomes, experience such trials as show trials. To them, it is a production and portrayal before the public eye of the accusation, evidence, judgment and punishment rather than an genuine investigation that would take all things into consideration under a presumption of innocence. It is experienced as part and instrument of the other's victory and consequential ability to exert power, as a juridical enactment of political realignment or transformation, rather than an independent establishment of guilt for previously established, proscribed and clearly defined crimes, in pursuit of justice. Or in the words of Gerry Simpson, the 'accused are guilty not because of what they have done but because of where they happen to stand when political forces are transformed.'[607] Otto Kirchheimer, for example, submits that political trials eliminate a political foe of the regime according to pre-arranged rules.[608] And in similar vein, Judith Shklar explains the political trial as a trial in which power, aided by a cooperative judiciary,

[606] See for a more elaborate account of this argument, Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook for United Nations Law* 1-36, in which he analyzes this paradox in the context of various trials, including the trials of Milosevic, Barbie, Eichmann and Touvier.
[607] Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 114.
[608] Otto Kirchheimer, *Political Justice. The Use of Legal Procedure for Political Ends* (Princeton University Press, 1961), at 6.

tries to eliminate its political enemies.[609] These understandings of the political trial build on Schmitt's friend-enemy distinction.[610]

Simpson explains the term 'show trial' as referring to a 'place beyond law where all that remains is a theatre of the macabre,' with the purpose of elimination, terror and intimidation.[611] The Moscow trials are often referred to as show trials. Between 1936 and 1938, the last Bolsheviks were tried and executed in Moscow. Similarly, in Prague, Sofia, Budapest and other Eastern European capitals, party elites were eliminated through show trials in the years after. Or 'liquidated,' as Shklar called it.[612] Hannah Arendt explained the purpose of show trials as a performance of a 'spectacle with pre-arranged results.'[613] Moreover, Nouwen and Werner explain that the point of a political trial is not to dismiss law as irrelevant, but rather to embrace the legal realm and use its independent and impartial image to legitimate their cause and struggle, using the integrity of the legal system for a political fight.[614]

6.5.2 Where Does This Leave the Accused? Setting the Stage for Counter-Narrative, Political Contestation and Rupture

A famous example of a trial that turned into a spectacle was the trial of Klaus Barbie. Barbie was a Nazi army captain and Gestapo member known as the 'Butcher of Lyon,' who tortured and murdered large numbers of people throughout WWII. He was brought to trial in Lyon in 1988, where he and his defense lawyer Jacques Vergès managed to turn the trial into a performance aimed at recriminating French authorities and the French political system and elite, for their colonial past, such as in Algeria, and collaboration with the Germans in Vichy France, and the impunity for those that had committed those crimes. By continually accusing France of committing war crimes since 1945, trying to undermine the French republic, they argued that the trial was merely a selective prosecution, an act of scapegoating and covering up other, much graver acts committed in the name of France. The effect of this strategy was that in the end, the innocence or guilt of Barbie became somewhat marginal in the spectacle orchestrated by both the French authorities and the defense's counter-narratives.

---

[609] Judith Shklar, *Legalism. Law, Morals, and Political Trials* (Harvard University Press, 1964), at 148-149.
[610] See for a discussion on this nexus, Sarah Nouwen & Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941-965, at 945.
[611] Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 108.
[612] Judith Shklar, *Legalism. Law, Morals, and Political Trials* (Harvard University Press, 1964), at 149.
[613] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books, 2006), at 266.
[614] Sarah Nouwen & Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941-965, at 946.

Having been placed in the dock, what are the accused's options other than turning the trial into a spectacle and accusing the system and those representing that system of staging a show trial? Usually, no warring state leader regards himself as aggressor. War is unpopular, and brings with it such high costs and risks, that it is hardly undertaken for just kicks. If a state decides to resort to armed force, its leadership will usually be convinced that it needs to resort to force, for instance for self-preservation, to uphold certain essential values or interests, geopolitical position, or to assist others against a (perceived) evil. Another may not agree that this war effort is legal or legitimate, and condemn it as aggression, and even roll out the whole apparatus of international criminal law, but that does not take away the reasons why the warring state felt urged to take the costly road of resort to force.

This is one of several reasons why criminological theories of prevention and deterrence so poorly apply to the question of the legitimacy of war. Using international criminal law to 'teach' the accused or others where morality lies, aiming to have them internalize interpretations of norms that they fundamentally reject, so that they will come to see that their conduct is morally wrong, seems rather implausible and a waste of resources, if that is what is aimed for. The analogy with domestic crimes for international crimes, and particularly for the crime of aggression, simply fails.[615]

The indeterminate nature of the notion of aggression and the likelihood that an individual accused of the crime of aggression will *fundamentally* disagree with the label of 'aggression' and rather sees himself as hero, opens the trial on the crime of aggression up to a likelihood of being experienced as a spectacle, and then also turned into one if the accused has the ability to do so. As was discussed above and for example by Vergès, this already occurred regularly in international criminal trials. There is no reason to believe that once a political and military adversary is subjected to a trial on aggression in which a rejected historical truth is presented, he would obediently cooperate with the proceedings, hoping for a slight deduction of prison time. On the contrary, there is every reason to believe that the accused will direct its defense entirely as an attack on the system and power that is represented by the prosecution's case. The rational defense strategy for such an individual in the dock is to turn the trial into a discussion on this *fundamentality* of disagreement on the legitimacy of use of force, rather than submitting to the victors' perception of what aggression is.

If faced with an accusation of aggression where convinced of the justness or necessity of the resort to force, the accused is likely to question the jurisdiction or even the whole idea of law application to the facts. In an aggression trial, not only the facts of the case and the interpretation of the law will be questioned but the whole framework and idea of applying law to the inherently political decision of the legitimacy of a

[615] This was argued by Tallgren in Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *European Journal of International Law* 561-595.

particular use of force will be challenged, creating in and of itself additional difficulties for the effectiveness and credibility of an adjudication on alleged aggression.

This is not new to international criminal law. In the trials of Milosevic, Seselj and Saddam Hussein, for example, defendants aimed at disrupting the trial rather than following the framework and aiming at acquittal or mitigation of sentence. Instead of putting to question the facts and/or the applicable law and argue that the position taken by the prosecution misunderstands, misinterprets, or just belies the facts or law relating to the case, the fundamental contestation that underlies the notion of aggression creates an impetus for a 'strategy of rupture.' Such a strategy is aimed at contesting not only the facts and law at stake, but the framework of the trial as such.[616] The fact that there *is* a court of law that has jurisdiction over the case, that it *is* a case at all, that there *is* a way of appropriately construing the situation in legal terms is not only part of the trial, but put by the defense as the central and only relevant question that is at stake.[617]

For defendants preferring such a defense strategy, winning the trial does not mean the same as what we usually conceive to be a winning defense strategy in a criminal case: acquittal or mitigation of sentence. For this type of defendant, winning means being successful at making a point and being *heard* to make this point. The trial is about taking this last moment of attention, nowadays in the eyes and ears of the world through mass media, to explain why they are right and why their position holds the moral ground, rather than that of the mistaken or guilty authorities that accuse them. It is an attack on the system which has wrongly placed the accused in the guilty box, and it attacks this experienced structural injustice through an attack on the Court, its judges, its Prosecutor, and all it represents. It is a battle on the fundamentals of what law and law application is.

The defense strategy that such a trial provokes is thus aimed at contesting the assumptions that the trial is built on that go back to the understanding of the context in which the scrutinized conduct was undertaken. An aggression trial inherently concerns large political events and requires an interpretation of the context of such political events, which is precisely what is disputed between warring sides. For the accused, the fact that he is on trial, and that a trial is conducted at all, represents that already one interpretation of the context is assumed, and it is not in line with the reading of the accused. To accept the terms of the trial is to accept this rejected reading of the context and history, and thus to accept the adversary's assumptions. This is what Jean-François Lyotard referred to as a *Différend*: a situation in which the regulation of the conflict is done on the basis of the assumptions of one of the parties,

[616] Jacques Vergès provides an analysis of the distinction between judicial strategies of 'connivance' and 'rupture,' the former aimed at contesting facts and law, and the latter aimed, additionally, at disrupting the entire framework of the law application and trial, in Jacques Vergès, *De La Stratégie Judiciaire* (Les éditions de minuit, 1968).
[617] Jacques Vergès, *De La Stratégie Judiciaire* (Les éditions de minuit, 1968).

and in which those of the other are not recognized.[618] This moreover places the judges in a constrained environment: when a case is brought before them, judges are submitted to a situation of this *Différend*, in which they have no choice but to accept the method or criterion of settlement, by which they have already accepted the position of one of the disputing sides that the situation at hand is evaluated in terms of aggression or non-aggression.

In such a situation, for an accused, submitting to the trial means submitting to defeat. Consequently, everything is at stake, and as such, everything requires contestation: not only the facts and the application and interpretation of law, but the entire context, history, the trial in its entirety, and even law as such. And no-one can tell how far in the past the chain of political causation leads. Not only the existence of *actus reus* is rejected, for calling the conduct aggression is fundamentally disagreed with, but the idea of a *mens rea* is also deeply contested. According to the accused, there was no intent to act criminally, but an intent to pay a high price (resorting to force with military means, with all costs, risks and peril it requires) for an even more important struggle: for defensive or humanitarian purposes, seeking justice, or out of necessity. Force then is about ideology, striving for the good life or saving the world from a present danger. Deterrence is irrelevant in these circumstances,[619] and the criminal law that is laid in the warrior's way is not only a hurdle on the way but part of the evil that must be set aside. What else can an accused do than to fight the legitimacy of the institutions, of the crime of aggression, and of the idea of applying law against its war, if it is genuinely believed to be legitimate?

6.5.3 Legitimacy of the Trial

It is precisely because an aggression trial eventually comes down to an extremely complicated and inherently political assessment of the root causes of conflict that led Carl Schmitt to argue against the crime of aggression. According to him, in the extreme circumstances of such intense conflict that (potentially) leads to war, only the actual participants of conflicts can recognize, understand and judge the concrete situation and settle the conflict, not a previously determined general norm or a judgment by a disinterested and neutral third party.[620] Law can therefore, in the view of Schmitt, not provide guidance let alone solution when it comes to the question of aggression and non-aggression. Hans Morgenthau phrased his critique on the idea of trials on aggressive use of force slightly differently. He held that there was not any

[618] Compare the argument of Lyotard on the '*Différend*' in Jean-Francois Lyotard, *The Differend. Phrases in Dispute* (University of Minnesota Press, 1988), at 9, cf. Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook for United Nations Law* 1-36, at 15.
[619] Jan Klabbers, 'Just Revenge? The Deterrence Argument in International Criminal Law', in *Finnish Yearbook of International Law*2000), at
[620] Carl Schmitt, *The Concept of the Political: Expanded Edition* (The University of Chicago Press, 2007), at 26-27.

intrinsic impossibility to adjudicate aggression in a court of law but that the rights and duties that are at stake in such a trial will be overshadowed by the intensity of the feelings concerning its injustice.[621] Hence, in the view of Morgenthau, a conflict that is rooted in intense feelings of injustice requires a political solution, not a court of law. Accordingly, Morgenthau concluded that international law should not be applied to situations that were essentially political. Morgenthau did not argue that there was no law on aggressive use of force, but claimed that whatever that law was, 'it was irrelevant for an intelligent assessment of the events.'[622]

The future may show whether and how the crime of aggression shall affect war and peace and what lies in between. And whether and how it is able to contribute to the broader goals for suppressing and preventing aggressive use of force, bringing peace, reconciliation, and ending impunity. It is however not helped by the unfeasible set of expectations that the international criminal justice project has set for itself, driven by ambition, hope, the need to convince donors, the desire to comfort victims and those whose 'conscience is shocked.' No domestic criminal justice system promises its constituency to end impunity. It tries to fight it, limit it, to the extent that society wants it to do so and wants to prioritize that over other societal needs. Where a national criminal justice apparatus seeks to *manage* crime, by reducing or at least respond to criminality, international criminal justice promises to *end* impunity for crimes. Or even to *end crimes* as such, as the UN Security Council declared when creating the ICTY and ICTR. It pronounced that it was determined 'to put an end to such crimes' and convinced that the creation of these tribunals 'would enable this aim to be achieved and would contribute to the restoration and maintenance of peace.'[623] Such utopian aspirations stand in shrill contrast to the dystopian realities that the Court and the international criminal justice project faces.[624] Despite the fact that prosecuting international crimes is often exceedingly more complex than those on the national level, in terms of the severity and scale of the crimes, complex gathering of evidence, enforcement issues, the establishment of facts, the politics inherently involved in such prosecutions, and moral plurality that brings not only diverse ideas about blameworthiness but also on what justice means, the ICC and the international criminal justice project do not shy away from unrealistic ambitions. In its course, it raises expectations that can only fail to be reached, hopes that can only be disappointed.

---

[621] Hans Morgenthau, *Die Internationale Rechtspflege, Ihr Wesen Und Ihre Grenzen* (Noske, 1929), at 73-84; see also Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), at 442.

[622] Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), at 481, referring to Hans Morgenthau, *A New Foreign Policy for the United States* (Praeger, 1969).

[623] UN Security Council Resolution 827 (1993).

[624] See Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 925-963, at 944.

International criminal trials are believed to contribute to such goals by breaking the collective cycle of guilt that may re-fuel conflict, resulting (again) in mass atrocity.[625] However, whether it may achieve this or in other ways promote peace and reconciliation depends greatly on the perceived legitimacy of the trial.[626] A trial that is experienced as a show trial, scapegoating a nation, group or individual may constrain rather than foster any such hopes with which the trial set out. Achieving any of international criminal justice's aspirations is conditioned by the international criminal justice project's, the Court's and the trial's legitimacy. But the legitimacy of the trial is challenged by fundamental disagreement on the 'aggression' norm, a norm that is contested in its core, because for one or the other, the norm is applied against what is perceived to be quite the contrary of aggression. The structure that applies this norm is rejected, and the legitimacy of such structures dismissed.[627]

If the crime of aggression's abilities and limitations are not appreciated sensibly, the Court may well be put at risk for its credibility, which is already under increasingly severe criticism since its establishment in 2002. The crime of aggression as it now stands asks from an adjudicator a decision that opens the door for fierce critique and resentment regarding the political nature of its decision, whether it goes one way or the other, in a culture of law in which political judicial decision-making is denied and seen as disloyal and violating the integrity of the law. It will place the adjudicator in the shoes of those that could not come to an agreement on fundamental disagreements themselves, only now in a criminal court of law. In the process of further moving towards the ICC's jurisdiction over aggression, it would seem wise to accept the reality of the crime of aggression's inherent political and contested nature, and to work towards a way of addressing this rather than ignoring and dismissing it.

In a criminal court of law, where morality is on one side and the criminal on the other, the verticality of the relationship between the law enforcer and criminal stands central. A criminal case is about condemning the bad to protect, maintain and emphasize the good. It therefore presumes the ability to distinguish between what is bad and what is good. Putting the ICC up for adjudicating aggression asks from criminal law to deal with the question of the legitimacy of use of force. It asks from the ICC and its judges to address, or even overcome, the fundamentality of the disagreement, to resolve the age-old question of the justness of war, and 'build' consensus and a 'common good.'

---

[625] Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (Times Books, 1998), at 211.

[626] Allison Marston Danner & Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 *California Law Review* 75-169, at 93-94.

[627] See also Sean Murphy for pointing to the contestation of the core of the norm and its relation to the legitimacy of the Court. He also makes the argument that the legitimacy of the Court is challenged by the crime of aggression's lack of coherence, asserting that the crime of aggression brings an 'unequal or illusory application of standards,' by excluding from the ambit of the crime of aggression conduct (threats to force, unconsummated but planned force, aggression on smaller scale) that is said to qualify as *ius cogens*, somehow determining that such *ius cogens* violations are not criminal in nature. Sean D. Murphy, 'Aggression, Legitimacy and the International Criminal Court' (2009) 20 *European Journal of International Law* 1147-1156.

It asks from the ICC to preserve fair proceedings where it is stuck in the paradox of being turned into a spectacle and condemned as show trial whether it does or not manage to take fair consideration of alternative narratives. And it asks all this in a time when the Court's already frail legitimacy becomes an even wider embraced vassal in political and military frontlines, where for those who find the ICC in their way, a willingness to sacrifice the global justice project is closer to heart than accepting its rule against oneself.

6.6 Concluding Observation: The Crime of Aggression in the Context of International Crimes

While this chapter and the analysis in this book is aimed at understanding the crime of aggression, this is in no way intended to suggest that issues and challenges here identified are not applicable to other crimes and unique for aggression. Critical scholarship has raised many concerns on the conceptualization as well as administering of international criminal justice, ranging from its tensions with criminal justice principles and its successfulness in achieving its aspirations to challenging whether the international criminal law emergence is helpful at all.[628] Conceptual studies have challenged whether international criminal law is 'international,' 'criminal law,' or even 'law.'[629]

Comparable dynamics and issues that this book identifies concerning the crime of aggression emerge also to certain extent with the other crimes under the jurisdiction of the ICC: genocide, crimes against humanity and war crimes. Fundamental disagreements challenge the application of law to other international crimes as well, and the challenges for the international criminal justice project that are identified in this book often go beyond those related to the crime of aggression alone. It would be a mistake, however, to dismiss or ignore these challenges for the crime of aggression by pointing to the other crimes and 'how well that is going.' Honest assessment should recognize that the international criminal justice project is not one without significant

[628] For example Mark A. Drumbl, 'The Push to Criminalize Aggression: Something Lost Amid the Gains?' (2009) 41 *Case Western Reserve Journal of International Law* 291-319; Elies van Sliedregt, 'The Curious Case of International Criminal Liability' (2012) 10 *Journal of International Criminal Justice* 1171-1188; Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook for United Nations Law* 1-36; Sarah Nouwen & Wouter Werner, 'Monopolizing Global Justice. International Criminal Law as Challenge to Human Diversity' (2015) *Journal of International Criminal Justice* 157-176; Alexander Greenawalt, 'The Pluralism of International Criminal Law' (2011) 86 *Indiana Law Journal* 1063-1130; Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 925-963, Frédéric Mégret, 'Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project' (2001) 12 *Finnish Yearbook of International Law* 195-247.

[629] See for instance Markus Dubber, 'Common Civility: The Culture of Alegality in International Criminal Law' (2011) 24 *Leiden Journal of International Law* 923–936 who argues that international criminal law is an ethos rather than a body of law and that it ignores the principle of legality rather than violates it.

hurdles nor an overriding success so far. Instead of dismissing issues raised for the crime of aggression because the larger project struggles with and muddles through similar issues, it rather suggests to consider the way international criminal law is developed with respect to those crimes as well. Rather than dismissing critique, opening to it and benefiting from it may well contribute in more sustainable ways to goals such as striving after justice, peace and security.

A criminal legal order in a particular state is a reflection from that society's socio-political idea(l)s on justice and order. They develop over time, in a complex political process, in which a multiplicity of factors play a role. Taking into consideration the difficulties and disagreements that this process faces even on the domestic level, one can imagine how challenging it is to come to such agreements and harmonization on a global level. Questions of international criminal law are often approachable from different perspectives, which derive from fundamentally differing conceptual frameworks and assumptions about politics, war and law; differing ways to look at and interpret the world and the role law can play in it.

Challenges that are associated with the moral pluralism of humanity, diversity of political interests, and assumptions that underlie views on the transnational global order and the role of international law and morality in it pose therefore a broader complication for the application of international criminal law than solely for aggression. However, some particularities come to the fore with the crime of aggression that cannot be equated with the entire international criminal law enterprise as such. It seems therefore useful to highlight some characteristics of the crime of aggression vis-à-vis the other crimes that the ICC has jurisdiction over (genocide, crimes against humanity and war crimes).

The most obvious difference is that where genocide, crimes against humanity and war crimes address acts committed in conflict, also therefore called international humanitarian law or the *ius in bello*-crimes ('rights/law *in* war'), the crime of aggression is aimed at the acts of commencing a war, of resorting to force to begin with. It is therefore also called *ius ad bellum*, 'right to war.' The other crimes have therefore less or not at all to do with the legitimacy of the resort to force as such, which question is even excluded from the application of international humanitarian law governing the assessment of whether or not war crimes have been committed. Instead, for aggression this highly contentious question that goes to the core of fundamentally differing views on world order and the nature of international relations and international law is the very core question.

Second, the crime of aggression is *par excellence* a collective crime since the deployment of armed forces usually requires multiple state actors to be involved and provide approval. However, for prosecution by the ICC, such collective decisions need to be dissected towards the responsibility of an individual person. Yet, none of the individual actors' decisions themselves were criminal as such since no one decision would have created the situation of resorting to force in itself. Where crimes

of humanity and genocide are also usually collective crimes, they require the collectivity to arise to the level of an *international* crime but the behavior in and of itself (murder, rape, persecution) is usually a crime in most if not all criminal law systems as such too. With the current standards of determining principal perpetrators and derivative aiders and abettors, it will be challenging to break the collective nature of the crime of aggression down to ascribing personal culpability without violating criminal law's principles of legality and personal culpability. Ambos, for example, questioned the ability of the crime of aggression's leadership concept, rooted in a Weberian and Prussian model of hierarchical organization with a chain of command, to capture modern, post-bureaucratic forms of organization.[630] The decision-making model in many contemporary societies includes a more complex and spread out decision-making process that may make the allotment of guilt on one or another less straightforward than the definition of aggression appears to assume. Ambos thereby also points to the challenges the criminal law framework brings in fixing on individual agency where the causes of war are particularly collective in nature. Criminal law is an exercise in individualization, also Simpson observes, in abstracting motivation from situation, in decontextualizing events, and in replacing social or political responsibility with individual culpability.[631] Yet, resorting to force never occurs in a vacuum but rather in a complex social reality, where agency and drivers from various corners and at various levels interact and affect the decision-making process and the occurrence of events after. Abstracting the guilt question from the underlying structures, from the state, from the government, and onto an individual is therefore particularly challenging.

Third, another special characteristic of the crime of aggression is that whether or not a certain conduct is aggressive depends on what the Security Council decides about it. The Security Council is not an adjudicatory body that looks at whether or not the situation meets certain previously determined criteria and is therefore aggressive or not. Instead, it is a political body in which 15 states determine on the basis of the situation at hand whether they choose to authorize use of force or not, and thereby make a resort to force lawful or refrain from such legalization. When in the absence of such authorization force is used, this may amount to aggression. Such authoritative decision-making that can take away the criminality of behavior does not feature with the other international crimes, even if the absence of Security Council action through a referral may provide a state *de facto* with impunity. It is, moreover, difficult to reconcile with behavior that is presented as *malum in se*, as an *inherently* wrong and criminal act.

Fourth, with aggression, the criminality of the very core of the crime is fundamentally disagreed upon, which is usually not the case with acts that fall in the scope of crimes

[630] Kai Ambos, 'The Crime of Aggression after Kampala', in *German Yearbook of International Law* (Duncker & Humblot, 2010), vol. 53, 463-511, at 492-493.
[631] Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 157.

against humanity and genocide.[632] Like war crimes, with the crime of aggression, the very core of the allegedly criminal behavior is only criminal under particular circumstances. In the case of war crimes, it is lawful to kill a lawful target with lawful means in an armed conflict and it becomes only a war crime if military force is aimed at a target that is not a lawful target or with non-lawful means, or when it is not proportionate or necessary. Similarly, resorting to force is lawful when it is subsequent to an armed attack or when authorized by the Security Council. Yet, as was noted above, even in situations in which the use of force was unlawful, it may still not arise to being a crime of aggression if the force is deemed to have been not a manifest violation of the UN Charter, whatever that means. As was discussed in Chapter 4, the legal definitions that have been agreed upon in 1974 and 2010 are open enough to allow continued contestation on whether or not a particular use of force is aggression. The law on point does not provide a substantive basis to mediate between opposing claims in those situations where law is looked at for guidance most. Notwithstanding the existence of some widely agreed upon instances of aggression, more often than not situations of (potential) resort to force spark discussions that law in and of itself cannot resolve. In these discussions, viewpoints are based on different and often contradicting underlying assumptions that generate fundamental disagreement on the aggressiveness of use of force.

All crimes are subject to disagreement on the periphery of the scope of the crime: on whether a certain act falls within or beyond the intended criminalized conduct. For example, there is contestation on whether it is a war crime to use a drone for targeted killing by bombing a house full of people because intelligence (not even evidence) indicated that there may be a terrorist present in this house, as the US and UK have been systematically undertaking in Pakistan for example; on whether an instance of mass rape is grave, widespread or systematic enough to qualify as a crime against humanity; and on whether the killing of one individual with genocidal intent should count as genocide or simple murder. Contestation is present wherever rules are used

[632] The crimes that fall under the category of 'genocide' are (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. The crimes that fall under the category of 'crimes against humanity are (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. Although each and every one of these crimes can be contested on its elements, on whether the alleged acts have taken place and fall under the scope of the provisions, the behavior that these categories of crimes criminalize is in its core is not usually regarded as lawful behavior. This is different for the crime of aggression and war crimes, in which cases force can be used under some circumstances and in certain particular ways but is criminal if circumstances or execution are different from what is required.

to attempt to separate allowed behavior from non-allowed behavior. Yet, with the crime of aggression such contestation goes to the very core of the crime. The same behavior can be seen as supremely criminal by some and heroic by others, each relying on equally sound *legal* reasoning since the norm is open enough to often allow legal support for opposite standpoints. This issue is not exclusive for aggression and also occurs on some of the crimes that fall under the categories of crimes of genocide, crimes against humanity and war crimes. Yet, with aggression, alternative legal frameworks are readily and easily available due to the openness of the use of force norm, and the intensity of the consequences of such a rule that is fundamentally rejected reaches the level of the very essence of state power and a state's ability to protect its way of life. It thereby produces a high probability that states will contest or just ignore the rule or even resort to armed force to protect themselves against such a rejected rule.[633]

[633] Another distinction between aggression and the other crimes is submitted by Erin Creegan, who points to a difference in harm inflicted between the crime of aggression and the other crimes. She argues that whereas the human suffering is clear in the human rights crimes, in abstraction, the harm of aggression is the violation of a state's territorial integrity, political independence and sovereignty, which should not be confused with the harm caused by war crimes or crimes against humanity that can be committed *during* war in Erin Creegan, 'Justified Uses of Force and the Crime of Aggression' (2012) 10 *Journal of International Criminal Justice* 59-82, at 62. Creegan claims that therefore the harm inflicted by aggression is more abstract and less directly the cause of human suffering than the harm caused by genocide, crimes against humanity and war crimes. However, although in the abstract this might be correct, Creegan's point seems difficult to hold up against the reality that it is difficult to conceive a use of force that meets the threshold clause of the crime of aggression (however one may interpret this) without the human suffering, death and destruction that inherently follow the (allegedly criminal) decision to resort to force. Another distinction is provided by Harmen van der Wilt, who distinguishes aggression and war crimes on the one hand from crimes against humanity on the other by asserting that in the former, the bonds of allegiance between rulers and ruled are reinforced, both during the conflict and when facing the victor's prosecution after defeat, whereas the alliance between the governors and population is irreparably damaged in the case of crimes against humanity because here the violence was directed against them, in Harmen van der Wilt, 'Crimes against Humanity: A Category *Hors Concours* in (International) Criminal Law? ', in Britta van Beers et al. (ed.), *Humanity across International Law and Biolaw*(Cambridge University Press, 2014), pp. 25-41, at . If this is indeed the case, the perception of a collective punishment looms. When a wide population embraces the acts that are prosecuted on the international level, this may enhance the experience of injustice and further entrench disagreement. Yet, the assumption of a population to follow (aggression) and not follow (crimes against humanity) the leadership appears too much of a generalization for proper understanding of the relations between state leadership and population in situations of such crimes.

7. THE POLITICS GENERATED BY ATTEMPTING TO SUSPEND POLITICS IN THE CRIMINALIZATION OF AGGRESSION

In the preceding chapters it was argued that the 'use of force'-discourse and the process of regulating and criminalizing aggression demonstrate that law and politics not only interact, but co-constitute one another. Due to the indeterminacy of the aggression norm and the disciplining force that it generates at the same time, which was discussed in Chapters 2 and 3 particularly, the failure to find substantive agreement on what aggression is, led to seeking agreement on procedural rules. This was seen to occur repeatedly in the negotiation history of the crime of aggression that was discussed in Chapter 4. Through these procedural rules, the substantive issues that are so fundamentally disagreed upon are delegated elsewhere. Yet these procedural rules also create new stages on which the same old contestation on what aggression is continues: on the basis of the same differing underlying assumptions but now resituated through different procedural arrangements and vocabulary. Yet, the substantive disagreement remains as fundamental as ever: the question of the aggressiveness of use of force does not become less political if re-labeled as a legal norm, nor does it become less fundamental if it is put before the Security Council or a judge to decide on, as was discussed in Chapters 5 and 6 particularly.

Moreover, both interpretations of what the 'manifest violation' means generate political consequences. The narrow scope will exclude most situations from the ambit of the crime of aggression and may be construed as supporting the legitimacy claim of an illegal but not regarded as criminal use of force. Sean Murphy observed that by not prosecuting those situations that the ICC finds to be genuine humanitarian interventions, the ICC may crystallize the customary international norm that allows humanitarian interventions.[634] Whether this is a 'correct' understanding or not, it may be argued and invoked by those who find it to support their own claims. If invoked by more, or by particularly powerful states, the argument gets a measure of normative force itself. The same rationale applies to other types of use of force, such as in self-defense and in interpreting Security Council resolutions that authorize use of force. Force that falls outside of the scope of the crime of aggression may be argued to be a lesser violation of international law, excusable, or not a violation of international law at all.

Yet, the alternative interpretation of the 'manifest violation'-criterion, allowing a broader scope of the crime of aggression and understanding that 'manifest' means to separate illegal but legitimate force from aggression, brings the determination of the crime of aggression ultimately to the 'legitimacy of use of force'-question. The

[634] Sean D. Murphy, 'Criminalizing Humanitarian Intervention' (2009) 41 *Case Western Reserve Journal of International Law* 341.

distinction between aggression and non-aggression relies on the distinction between use of force that is for 'the good' and that which is not. This places the Court in the center of political controversy.

The previous chapters thereby discussed that attempting to suspend politics by bringing disagreement on states' use of force within the realm of law does not resolve the fundamental contestation on what aggression is and that it produces a particular kind of legal construct. They moreover discussed that rather than suspending politics, this particular kind of legal construct actually produces and reinforces political contestation. This chapter continues by zooming in more specifically on the kind of politics that is generated by such a norm. It discusses the particular kind of politics that is generated by labeling the opponent as criminal, and accompanied by moral repudiation as one of 'the most serious crimes of concern to the international community as a whole.'

7.1 Morality Politics of the Righteous

This moralization of the concept of war that took place during the 20th century, particularly, led to the view that war became a 'crime' on one side and defense or enforcement of morality on the other.[635] It thereby became discriminatory between the parties to a conflict.[636] Today, by enabling the ICC to prosecute individual state leaders for the crime of aggression, this vertical relationship between law enforcer and criminal, between morality and crime, and between good and bad is embedded and institutionalized. It thereby not only rejects the idea of equal opponents, *hostes iusti*, but also the right to neutrality.[637] In the contemporary use of force system where

[635] Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), at 418.

[636] See for this argument in particular, Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (Telos Press Publishing, 2003).

[637] In his inaugural lecture on the concept of 'the pirate,' Louis Sicking analyzed the conceptualization of the enemy status of pirates in the history of public international law. He pointed out that this history shows two different understandings of the enemy status of pirates. The Cicero paradigm understood pirates as enemies of all (*communis hostis omnium*) who commit crimes *ergo omnes*, and are as such not like enemy states, but enemies of humanity, outlaws and placed outside of the legal order, and consequently without rights. This description was used to emphasize the inhumane nature of the pirate, who is objectified as inherent criminals: if conducting piracy, its behavior is necessarily criminal. Such an understanding resonates with an idea of an international legal order with authoritative powers to determine and declare right and wrong in a territorial space. However, as Sicking shows, history demonstrated a rather more complex picture and against this Cicero paradigm existed the Augustine paradigm that applied to regions and eras that lack such clear and undisputed ruling power. Contrary to Cicero's views on piracy, Augustine regarded piracy a normal manner to earn a living. In for instance the Middle Ages, pirates were often used by states in their war efforts, to destabilize an enemy state or to retaliate against a committed wrong. Pirates were not at all 'enemies of humanity.' Instead, the pirate and the admiral were exchangeable functions depending on the circumstances. The enemy pirate was regarded to be a criminal, the pirate that did not fare against one's interests was not, and could even be charged with official functions in a next battle. See Louis Sicking, *De Piraat En De Admiraal* (Brill, 2014).

whichever side the Security Council chooses is thereby automatically the lawful and legitimate side, the other side is by default rogue, relating to each other in a vertical manner. Neutrality can no longer be maintained, because to be neutral when the choice is between good and evil is to side with evil. 'You are either with us, or against us,' the rationale goes.[638] Moreover, pursuant to Article 25 of the UN Charter, states are obliged to accept and carry out decisions of the Security Council, which, as provided by Article 103 of the UN Charter, trumps any other obligation under international law, including neutrality.

The side that the majority, the powerful or the Security Council determines to be the wrong side becomes a justified target for intervention, to jointly enforce against in order to stop the criminal, through regime change or other forms of disempowerment. The transformation of the notion of aggression into a criminal law norm emphasizes and enforces this idea of a vertical relation between sides in a conflict, between right and wrong, law-enforcer and holder of morality versus criminal and rogue. The purpose being, to suspend the politics of states' ability to use force aggressively by restraining states through law.

However, in absence of universal agreement on what morality holds, and on what use of force is for 'the good' and what is not, Chapter 4 showed that adopting a rule on aggression required the norm to be open enough to include multiple interpretations of what aggression is. The process of regulating and criminalizing aggression therefore brought disagreement on states' use of force within the realm of law in an attempt to suspend the politics of states' use of force. In this process, the norm is continually (re)constituted and (re)shaped, opening and closing argumentative venues that are recognized as valid and persuasive, and enabling and disabling politics that those norms and argumentative strategies enact. It for instance enables various ways in which a particular use of force that is fundamentally and intensely felt as necessary by one can be claimed by another to be aggression. The opponent can use this accusation to support its own position and weaker the other's. Such an open rule thus creates legal argumentative space for deliberation and contestation; in other words, politics.

The stakes are high when it comes to a rule that limits a state's abilities to use force to protect its polity and people against external threats. Consequently, any rule that tries to delimit aggression from non-aggression in a way that produces undesired effects, reinforces the intensity of interstate relations. The crafting of this rule is experienced as a risk because it may hamper one's own abilities to use force when it comes down to it and enhance the other's abilities to do so. As was discussed before, the aggression norm promises paradoxically to protect states' freedom from another's aggression and states' freedom to use force for the 'good' at the same time. On top of that, the practice of creating any rule to do so creates a situation where, instead, states fear that the rule *puts at risk* their freedom from another's aggression (by not

[638] For an insightful analysis of the war conceptualization and the changing nature of the enemy-concept between the Concert of Europe period and the interbellum, see Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (Telos Press Publishing, 2003).

criminalizing undesired use of force) and *hampers* their freedom to use force for the 'good' (by criminalizing desired use of force). Even though states want to make sure that others cannot fight wars against them, they have not been willing to give up *their* ultimate and fundamental right to resort to force when perceived to be needed for self-preservation, or to protect vital interests or fundamental values. Because of this intensity of the consequences of a 'wrong' rule, compromise is not easily reached on crafting a substantive rule that would distinguish between aggression and non-aggression in a morally pluriverse world.

Consequently, in the context of this moral pluriverse and the intensity of the consequences that come from a 'wrong' rule on what aggressive use of force is, the only provisions that were acceptable to all were provisions that were broad and open enough to include fundamental disagreement to maintain, which, in absence of a meta-criterion to guide judges on how to prioritize and weigh opposing claims, leaves it up to the judges to decide how to maneuver this. As was discussed, the politics of suspending politics therefore creates a particular kind of law in which opposing reasoning and positions find space to be argued on legal terms and in which resolution between opposite claims is delegated elsewhere. However, the politics of suspending politics thereby not only generates a particular kind of law, but also generates a particular kind of politics.

As discussed in the previous chapters, in order to shift the determination of aggression away from politics, the *legal* determination for the purpose of the International Criminal Court, paradoxically, became the inherently *political* standard of legitimacy. A norm that is presented as universal and *mala in se* is in fact deeply contested. Rather than creating a space of neutrality and impartiality beyond politics, the regulation and criminalization of aggression may thereby also intensify political struggles. Through the regulation of the notion of aggression, parties to a conflict are provided with legal language to hold their dispute in. Disagreement may thereby be translated in 'rights'-language. In 'rights'-language, each side is empowered to claim the right to do this or that, and to claim the obligation of the other to do this or refrain from that. Disputes about use of force can move from claims that the other is wrong to claims of the one and only true interpretation of law and right, and that the other holds the wrong interpretation of law. The norm provides sides in a conflict with a language that leads to rather uncompromising positions. It provides sides in a conflict with a language to claim to uphold the (only) right and just position. Disagreeing with this position is no longer the holding of a different view but becomes an alleged 'mistaken understanding' of the law, entrenching positions rather than resolving disagreement. Particularly because 'neutral' arbiters in the form of adjudication are rarely available in the realm of international relations and international law.

Criminalization takes this entrenchment to another level. The morality that comes from international criminal law's presentation as addressing crimes that are inherently criminal and blameworthy, *mala in se* crimes, and only the most serious of those, adds a further moral layer to this disagreement. Not only is the position of the other

disagreed with and an alleged mistaken interpretation of the law, it also represents evil: it tries to justify a crime that belongs to the most serious crimes of concern to mankind, and a crime against all, *erga omnes*. Engaging in this kind of language may therefore further entrench conflict, which, for example, may make negotiated settlement or compromise even harder to find. It enables and generates a particular kind of politics by labeling the opponent as criminal, even enemy to humanity, for violating the highest norms. The attempt to suspend politics through law thereby not only encounters the problem of fundamental disagreement that cannot be overcome by merely using legal language, it also paradoxically generates a different kind of politics through law's disciplining power.

Invoking law and morality may just be for rhetorical use. Despite accusations of these violations, states may still engage in political and economic cooperation, or otherwise. Using legal language is not necessarily directed at the opponent, but may be employed to achieve alternative political ends, among their own constituency or to enhance diplomatic relations for example. However, if disputes get held in legal language, contestation may also entrench. The power of the legal argument generates the presumption that there are objective rights and wrongs, rather than mere difference of opinion. And when each side is convinced it has 'the law' on its side, compromising becomes harder. Moreover, by taking on the rationale of the body of international criminal law, reserved for the 'most serious crimes of concern to the international community as a whole,' such entrenchment is catalyzed with a layer of moral repudiation, denouncing the other as enemy of mankind, entrenching one's own righteousness further.

Therefore, because the crime of aggression norm contains argumentative space for different approaches and interpretations on whether use of force is aggression, the crime of aggression enables both sides to be self-confidently righteous by upholding *their* 'true' interpretation of the law, reflecting *their* morality, worldviews and interests.[639] The legal language, perhaps buttressed by court rulings in the future, is a dimension through which, paradoxically, many types of regimes and moralities can affirm their policies and viewpoints.[640] Rather than suppressing the politics of distinguishing between aggression and non-aggression, the criminalization of aggression thus, paradoxically, generates it in a different form, through a labeling of the opponent as criminal, rogue and outlaw, with the instrument of force ready to be used to enforce this claim, and an added layer of moral repudiation that the instrument of international criminal justice brings.

Criminalizing aggression through the language of universalism and moralism thereby generates a politics that Schmitt described in terms of the friend-enemy antithesis.

[639] See for this point also David Kennedy, 'Lawfare and Warfare', in James Crawford & Martti Koskenniemi (eds.), *The Cambridge Companion to International Law*(Cambridge University Press, 2012), at 165.

[640] See for the way in which legal language creates argumentative space for opposing claims also Otto Kirchheimer, *Political Justice. The Use of Legal Procedure for Political Ends* (Princeton University Press, 1961), at 17.

International criminal law facilitates the transformation of one's enemy into an enemy of mankind. Rather than being anti-political or a-political, the international criminal justice system serves, enables and entrenches friend-versus-enemy groupings. Gerry Simpson also pointed to this when he held that in the absence of clear standards to distinguish between aggression and non-aggression and a shared global morality, 'there is a tendency to criminalize our enemies *because* they are our enemies.'[641]

Accordingly, criminal law's presumption of the ability to distinguish between good and bad and its inherent perspective of a vertical relation between sides (good *versus* bad), may make actors in fact particularly uncompromising in their dealings on resort to force and lead to a morality politics of the righteous. The imperatives of punishment and retribution trump ideas of negotiation, reconciliation, diplomacy, rationalization for the sake of other values and cooperation, or, as Lord Hankey put it, the realization that 'it must always be kept in mind that after a war we have sooner or later to live with our enemies in amity.'[642] If the existence of incompatible systems of rules and morality is denied, the opposed claim of morality and legitimacy must therefore be wrong rather than mere different. The 'righteous' party may feel its claim to be a matter of justice, which, if both sides feel right(eous), as is often the case, may well lock the conflict into further intensification and leave us staring into the horizon for compromise or negotiated settlement, as its potential drifts away. As was discussed in the previous chapter, the peace and justice discussion show that if not exercised with some nuance for the particularities of conflicts, the ICC's 'ending impunity' agenda may have the adverse effect of prolonging conflict instead of creating a basis for restoration. By calling for guilt, blame, trial and punishment, the ICC and the international criminal justice project at large puts itself at risk of becoming the enemy of politics rather than its partner in the striving after justice, peace and security.

7.2 The Politics of Lawfare

The type of politics that is generated by regulating and criminalizing of aggression not only enables a morality politics of the righteous, but also empowers law's use as an instrument in 'lawfare.' Law can be used as a strategic instrument to entrench positions and presume verticality in correctness, morality and validity of the argumentation. As discussed, due to the complexity of assumptions that underlie the notion of aggression, the legal concept of aggression is flexible enough to provide for different interpretations of aggression. Therefore, in many situations, both sides in a conflict can accuse the other of aggression by each relying on legal argumentation. This method to accuse one's opponent of aggression has become increasingly

[641] Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 158.
[642] Maurice Pascal Alers Hankey, *Politics, Trials and Errors* (Henry Regnery Company, 1950), cited in Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 158.

powerful with the regulation of war, i.e. encapsulating the previously non-legal realm of war with legal norms, and particularly with its criminalization. As David Kennedy explained, with the development of law as vernacular of political judgment, and with the fading of distinctions of war from peace and of law from morality and politics, war has become 'the continuation of law by other means,'[643] twisting Von Clausewitz' famous premise of war being the continuation of politics by other means. Kennedy asserts that Clausewitz was right in his assessment in his time that war is a continuation of politics with other means, but that the notion of law, and particularly its separation from politics, has changed fundamentally, as well as the separation of war from peace.[644] Law has become a strategic tool for military and humanitarian actors to frame a situation to their advantage. It has become a way to communicate a message, to argue for the legitimacy of one's actions and to delegitimize the opponent's actions.[645]

'Lawfare' is understood by Charles Dunlap and David Kennedy as a concept that helps understand how '[l]egal arrangements not only put limits on warfare, but also provide venues to legitimize the use of military force, to de-legitimize the enemy, and to supplement the use of force with less destructive – and less costly – means.'[646] In addition to providing the language for morality politics and righteousness, by enlarging the arsenal of warring sides with the weapon of lawfare, the regulation and particularly the criminalization of aggression provides for a potential intensification of the battle. Struggle consequently continues, not only on the battlefield, but also in the arena of the law.

How the notion of aggression is usable as a weapon of lawfare becomes apparent when looking at particular conflicts to see how the arguments accusing an opponent of aggression are structured. For example, argumentative practices used in the Nagorno Karabakh conflict in the disputed border area between Azerbaijan and Armenia illustrate how the regulation of use of force allows for this strategic use of law. This conflict that started in 1991 falls outside of the scope of the crime of aggression since this is not an operative clause currently, and the conflict would have been commenced earlier when it will become operative. However, both sides in the Nagorno Karabakh conflict accuse the other of committing aggression. They invoke the UN Charter, the 1974 Definition of Aggression, and all other international law norms that they find relevant, to argue their respective cases. With the crime of aggression amendment, and perhaps even more so when the ICC will have jurisdiction over potential crimes of aggression, the argumentative strategies that are discussed below gain the moral layer that was discussed in the previous section.

---

[643] David Kennedy, *Of War and Law* (Princeton University Press, 2006), at 46-47.
[644] David Kennedy, *Of War and Law* (Princeton University Press, 2006).
[645] David Kennedy, *Of War and Law* (Princeton University Press, 2006), at 125-126.
[646] Wouter Werner, 'The Curious Career of Lawfare' (2010) 43 *Case Western Reserve Journal of International Law* 61-72, at 66. I understand the term 'lawfare' in this context conform the work of Charles J. Dunlap Jr., 'Lawfare Today: A Perspective' (2008) 3 *Yale Journal of International Affairs*, at 146.

In the Nagorno Karabakh conflict, both sides dress their positions in legal terminology (violating territorial rights, self-determination, human rights, etc) to convince the world that *they* are law-abiding but that the other is the violator, the aggressor. By these accusations and by invoking law to convince the world of the wrongfulness of the other's behavior, legal argument is used not so much to convince the *opponent* of the rightness of one's claims, but rather for the purpose of winning in the forum of global public opinion, which has come to form the other battlefield, called international law.[647] This may take the form in which all cooperation or willingness to strive to a compromise is rejected and the opponent is dismissed as rogue, but invoking law may also be a way in which to garner international support, in order to strengthen ones bargaining position in this forum of global public opinion.

Even though both sides use the language of law,[648] they rely on differing and often contradictory underlying assumptions with regard to the notion of aggression that they employ when posing their arguments against each other. Different conceptual frameworks are applied depending on the type of argument that is being rebutted. The result is that their arguments not only contradict when put opposite one another, but are also internally contradictory. This is a symptom of the indeterminacy of the notion of aggression. And *because* of its indeterminacy, the notion of aggression lends itself to being used as a weapon of lawfare in conflicts where the legality of the use of force is disagreed on; the indeterminacy of the norm enables and generates its disciplining force rather than renders it useless or irrelevant as the realist logic has us believe.

Today, the Nagorno Karabakh conflict finds itself militarily at a stalemate, even though this may be changing with the way Azerbaijan is currently building its military. However, against this weighs that regional power Russia is likely to protect Armenia against any Azerbaijani military activity that could break the *status quo*. For over 20 years, the Armenian Karabakhis, helped by Armenia, have been effectively controlling an area that the UN recognizes as belonging to Azerbaijan, and have formed a *de facto* independent state.[649] The 'international community' is not interested enough to intervene or actively push for a sustainable solution, partly because both sides need to be willing to compromise, which they are currently not.

[647] See for a detailed account of the arguments both sides use to accuse the other of committing aggression, Marieke de Hoon, 'Collateral Damage from Criminalizing Aggression? Lawfare through Aggression Accusations in the Nagorno Karabakh Conflict' (2012) 5 *European Journal of Legal Studies* 40-61.

[648] See on the international laws about war as a common legal vocabulary for assessing the legitimacy of war, David Kennedy, *Of War and Law* (Princeton University Press, 2006).

[649] However, even though clearly independent from (because fighting against) Azerbaijan, one can wonder to what extent it is independent from Armenian influence and control. Meanwhile, Nagorno Karabakh functions as an independent state. It has a parliament, a government, a justice system that includes a court of first instance, a court of appeal, and a supreme court, democratic elections supervised by an electoral commission, schools, universities, civil society organizations, a television station and newspapers, and an airport waiting to be opened. And all this with a population of less than 150.000 citizens, in a state of war, and in a decidedly poor economic situation. It is a world of contradictions: in a state of war with Baku, the Armenian Karabakhis hold effective control over an area of at least 7.000 square km, for over 20 years now, even though no state has recognized this independence, not even Armenia.

And Azerbaijan is militarily not powerful enough (yet) to invade and forcefully retake the area. Aside from regular sniper fire in the border area, the current battle is therefore predominantly fought in the legal arena. Interestingly, both sides use the legal paradigm to add to their violent, military struggles on the ground; a legal fight on the battlefield of global public opinion and international law. In this context, Charles Dunlap defined lawfare as the 'strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective.'[650]

In our legally and morally pluralist world and in the '*fluidity* and *diversity* of the legal context,'[651] law is used as a strategic asset by those who have the power to influence military operations and geopolitical interaction. International law is elastic enough to enable diverse interpretations, as often more than one law applies, in more than one way, and with more than one interpretation thereof. The complexity of differing assumptions that underlie the notion of aggression allows parties to invoke differing interpretations and switch between differing underlying conceptual frameworks, while speaking the same 'language' of law, making it an instrument that is flexible enough to be a felicitous weapon in the struggle for global public opinion. Besides being well-suited for lawfare, it has moreover become an increasingly *powerful* tool for lawfare because the regulation of war and the criminalization of aggression has provided the accusation of an opponent of committing aggressive war with the connotation of it being a *ius cogens* violator and a morality politics of the righteous against a criminal, guilty of committing an international crime, claimed to be one of 'the most serious crimes of concern to the international community as a whole.'[652] Parallel to the development of law as inseparable from politics, and the development of war as inseparable from peace, this moral condemnation has made the *ius ad bellum* a strategic partner for both sides in a conflict.[653]

It is difficult to assess this development as being 'good' or 'bad' as such. Providing instruments in terms of law rather than military means seems a less harmful manner of fighting a war: who will die or lose a limb from that? But changing the battlefield to the arena of law does not solve the conflict. The positions and objectives of the parties to a conflict remain opposed. As peace-negotiator Paul Williams noted, '[t]hey may switch their guns for their pens, but they are still engaged in a very aggressive action to accomplish those same political objectives that led them to the battlefield. Most often, when agreeing to a peace process, the parties have not changed their positions but have simply changed the venue of the battle.'[654] This is highly visible in the Nagorno Karabakh conflict. Economic circumstances and (geo-)political considerations may have brought parties to verbalize their positions in legal terms

[650] Charles J. Dunlap Jr., 'Lawfare Today: A Perspective' (2008) 3 *Yale Journal of International Affairs*, at 146.
[651] David Kennedy, *Of War and Law* (Princeton University Press, 2006), at 38 (emphasis in original text).
[652] Preamble, Rome Statute.
[653] See David Kennedy, *Of War and Law* (Princeton University Press, 2006), at 41.
[654] Paul R. Williams, 'Lawfare: A War Worth Fighting' (2010) 43 *Case Western Reserve Journal of International Law* 145-152, at 147.

rather than only through military power, but a solution to the deep-rooted conflict is ever so far away, and ready to burst out again beyond the current near-weekly casualties.

Despite the presumption that the prohibition to use force in the UN Charter provides legal mechanisms to monopolize war and 'to save succeeding generations from the scourge of war,'[655] it has in fact created a constitutional regime of legitimate justifications for warfare.[656] The arguments in the Nagorno Karabakh example as well as the arguments invoked in the recent use of force state practice discussed in Chapter 3 provide some insight into the wide variety of possible justifications for the supposed *ius cogens* norm.[657] For example, in preparation for the annexation of Georgia's South Ossetia and Abkhazia in 2008, Russia provided Georgian citizens with Russian passports. When conflict broke out between Russia and Georgia, Russia invoked the international law on diplomatic protection to act on behalf of 'its' Russian(ized) citizens. According to international law, the right to provide diplomatic protection provides that states can take action against another state on behalf of its nationals whose rights have been violated by the other state. Law thereby provided Russia with the strategy of 'passportization' through which it could claim that its annexation of South Ossetia and Abkhazia was lawful. To claim the lawfulness of the involvement of Russian forces in Crimea, President Putin invoked a 'responsibility to protect'-type argument that Russians needed to protect their compatriots and invoked NATO's bombings in Syria in 1999 as a legal precedent to argue that Russia had the right to intervene for humanitarian reasons.

By providing the vocabulary for restricting the occurrence of war but *at the same time* for legitimizing the decision to go to war, the prohibition of the use of force has not banned war, and certainly not prevented war as many post-WWII examples have shown. Rather, it has provided a new strategic tool for the continuation of the conflict. As Kennedy put it, 'this bold new vocabulary beats ploughshares into swords as often as the reverse.'[658]

In its aspiration to address atrocity crimes globally and provide empowerment and redress to victims, the international criminal justice project finds itself in a political reality it cannot escape from, but it also generates a politics of its own. By going after one and not the other, fighting one and asking for and relying on cooperation from the other, it aligns itself in the friend-enemy contestation of the political realm. In their article on the politics of the ICC's interventions in Uganda and Sudan, Sarah Nouwen and Wouter Werner demonstrate how the Ugandan government redefined the conflict in northern Uganda in order to use international criminal justice as an instrument to

[655] Preamble, UN Charter.
[656] David Kennedy, *Of War and Law* (Princeton University Press, 2006), at 79.
[657] Presumed, because one may wonder whether it is not a *contradictio in terminis* to have justifications for breaking a *ius cogens* norm.
[658] David Kennedy, *Of War and Law* (Princeton University Press, 2006), at 167.

condemn and defeat its enemy.[659] In addition to all else they could denounce their enemies with, they could now also brand them as internationally wanted criminals, having committed atrocities that made them enemies not only of the Ugandan government, but of the entire world.[660] Moreover, it allowed the Ugandan government to present itself as aligned with the international criminal justice project, fighting on the good side, aligned with the law enforcement side.[661] Likewise, Darfuri rebel leaders have used the condemnation implied in the Security Council referral to the ICC and the ICC's arrest warrants for their enemy, the government of Sudan, to strengthen their own legitimacy. They used this to refuse and delay negotiating and compromising in the hope that the Court (their ally) would weaken their (joint) enemy, and thereby obtaining a more favorable negotiating position.[662] Despite perhaps international criminal justice's own hopes and aspirations of occupying a non-political space in a political world, 'law' is not the antithesis to 'politics.' International criminal justice is inherently political, even though this does not mean that it is to be equated with politics. It is up to the lawyers that practice international criminal law, the diplomats that negotiate the content of international criminal law, and all others involved in the construction of international criminal justice to be aware of the politics their work enacts and generates, thereby not diminishing the 'legal value' or any other value of the undertaking, but striving after improving the quality of both the law and politics involved.[663]

The criminalization project carries the risk that the usefulness and strength of the crime of aggression (and the broader international criminal justice project in its wake) for morality politics and lawfare might jeopardize the normative force of the crime of aggression and international criminal law.[664] In this respect, David Kennedy raised concerns regarding the responsibility of lawyers, both in the military and in the humanitarian professions. By presenting law as a mechanism through which all relevant factors are taken into account and justice is its only outcome, lawyers create an image of law that it cannot deliver.

This is not necessarily or solely due to parties' and their lawyers' use of the notion of aggression (because if the law allows for it, why shouldn't they?), but due to the abilities and limitations of the notion of aggression and of law in general for providing

[659] Sarah Nouwen & Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941-965, at 949.
[660] Sarah Nouwen & Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941-965, at 949.
[661] Sarah Nouwen & Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941-965, at 950.
[662] Sarah Nouwen & Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941-965, at 957.
[663] See for similar arguments also Sarah Nouwen & Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941-965, at 964; Judith Shklar, *Legalism. Law, Morals, and Political Trials* (Harvard University Press, 1964), at 145.
[664] David Kennedy, *Of War and Law* (Princeton University Press, 2006), at 135; Wouter Werner, 'The Curious Career of Lawfare' (2010) 43 *Case Western Reserve Journal of International Law* 61-72, at 67.

answers to every question. Regulation, and especially criminalization, raises the presumption that law can prevent war or resolve its underlying conflict, and that it can always provide the answer to which side is good and which is bad, to which party has the law on its side (if any), and which does not. Understanding the law in this way, as a means to give 'right' answers and solutions to any conflict that arises, and thus as a mediating force, seems rather to be an overstatement of the law's capabilities. Such an interpretation of the ability and function of international law falsely provides the idea of the legal language as necessarily encapsulating truths. But it is precisely this perception that allows an indeterminate notion as aggression to be used as weapon of lawfare.

While wars of aggression are believed to be one of 'the most serious crimes of concern to the international community as a whole',[665] at the same time, the meaning of aggression is stretched and molded to mean almost anything one wants it to mean because the indeterminacy and variety of frames through which it can be interpreted allow it so. In David Kennedy's words, '[w]here it is clear, the law in war will have winners and losers. Where the law is open and plural, it will be pulled and pushed in different directions, articulated in conflicting ways, by those with different strategic objectives.'[666] War is the topic *par excellence* where the law is open and plural, and where a state will model law to support its politics. Through it, it is also the topic *par excellence* where law disciplines the political, by enabling new argumentative strategies and closing off others. It thereby sings into existence new realities, new spaces of contestation, with the same old openness, the same old disciplining power, and an ever repeating dynamic of delegating elsewhere of the question of what exactly aggression is.

Without denying or dismissing the positive effects the crime of aggression may have in the search for justice, peace and security, it is also important to note reversed effects, and attempt to reduce those by understanding how to address them. By presenting law as a solution-bringing instrument, and by attaching to aggression the label of 'international crime' despite its indeterminacy, contestation in conflicts may in reality be entrenched and the normative force of the aggression norm and international law put at stake. Whatever effects it may have in terms of prevention, retribution or expressivism, the crime of aggression also creates the illusion that law can deliver solutions where it cannot. It adds a layer of moral repudiation to the already heated mix of disagreements in existing conflicts. And it provides warring parties with yet another weapon to fight with, and yet another battlefield to fight on.

[665] Preamble, Rome Statute.
[666] David Kennedy, *Of War and Law* (Princeton University Press, 2006), at 127.

8. CONCLUSION

This book has fused together two narratives. On the one hand, it told the story of how the right of states to resort to force changed into the crime of aggression in the past 100 years, and placed this development in the context of legal thinking about war in the centuries that preceded. It recounted how this process saw several repeating dynamics of contestation, postponement, diplomatic maneuvering, and proceduralization in the form of delegating decisions about the substantively fundamentally disagreed upon issues elsewhere, but off the diplomats' table. It also observed how the current crime of aggression relies on differing and often contradictory underlying assumptions, derived from conceptualizations of use of force that appear mutually exclusive, and that the crime of aggression fuses together legal frameworks that similarly blend in one provision various assumptions on what law is expected to do. Moreover, it discussed what challenges this brings for trying an aggression case at the ICC and what kind of politics this type of law generates.

On the other hand, a second narrative distinguished four different ways in which the relationship between law and politics materializes in these discussions on aggression:

1) that using legal language disciplines the political sphere to a certain extent;
2) that legalization and the use of legal language does not overcome the fundamentality of the disagreement over the deeply contested issue of what is and what is not aggressive use of force;
3) that the choice for seeking law's disciplinary force despite fundamental substantive contestation leads to proceduralization and the delegation of substantive disagreement elsewhere, to other *fora*; and
4) that this choice carries the consequence that disagreement may be entrenched through the power of legal language rather than resolved.

The second narrative described how the regulation and criminalization of aggression can be read as a story about using law as a means to suspend the politics of war decisions, but not getting past contestation on where to draw the line between what is and what is not aggression, and then getting to consensus through diplomatic skillfulness and procedural arrangements. This second story reframed the first, and drew attention to how the regulation and criminalization of aggression (the first story) shows how law and politics relate to and mutually (re)constitute one another. This chapter concludes with some final observations on each of these law/politics-interactions.

8.1 Discipline

If there is one element that all examples of use of force in the past decades that were discussed throughout this book have in common, it is that those conflicts are not only fought out on the battlefield, but also in the arena of global public opinion, with the legal language as the weapon of choice. These examples illustrate how the language of international law functions as a vocabulary and grammar to international politics. It provides the vocabulary by conditioning which words are and are not used in international politics. For instance, no state will say that it chose to act as aggressor, as it will not only thereby admit to the illegality of its own acts but it is also politically damaging. Instead, states say they defend, protect, or restore. Moreover, international law provides a grammar to international politics by providing a structure through which arguments are constructed, in legal vocabulary and following the grammar of a legal logic that requires it to be buttressed by legal sources and that regulates what is and what is not recognized as valid as well as persuasive. Words like defend, protect or restore are placed in structures in which, for example, 'defending' is connected to the right to self-defense or defense of others, 'protecting' is connected to the responsibility to protect doctrine and invokes the Kosovo situation as precedent, and 'maintaining or restoring stability' alludes to the UN Charter's nexus between using force and maintaining or restoring international peace and security.

To dismiss international law as irrelevant doesn't explain why international law is the language that is chosen to discuss matters of international relations in. As was discussed in Chapter 2, choosing the language of law is done, for instance, to bolster reputations, to conceal violations of law, and to push the meaning of law in certain directions. By using this language, states are restrained, at least to certain extent, to act in ways that can be supported by legal arguments, although the indeterminacy of the crime of aggression norm and international law allows for a wide array of argumentation, to support a wide array of use of force with legal reasoning. Conversely, states are also *enabled* to act as long as the claim of legality or legitimacy of these acts can be buttressed by legal arguments, widening the availability to use force perhaps beyond what would have been found politically opportune or morally prudent outside. The legalist framework has as consequence, however, that such considerations are seen as external to whether is allowed to act.

Law disciplines those discussions by excluding argumentative structures that are not recognized as being 'legal' (for example morality, emotion, interest calculations). Moreover, in addition to excluding argumentation, law's indiscriminate nature and generalizing quality *includes* argumentation that follows the legal logic, that is based on legal sources or invokes natural law, and that is expressed in legal language. As such, law's disciplining power not only excludes arguments that are not recognized as 'legal' (in the sense of a-legal or non-legal) but also provides that any argumentation that is recognized as 'legal' attains a legitimating force for the position it buttresses. And by engaging in this argumentative practice to bring to the fore new argumentative

strategies and interpretations, the meaning of the norm is reconstituted. Interpreting a norm in a particular way that is followed by another state in a more or less consistent manner produces state practice that produces what we understand as customary international law. Through its structural indeterminacy, the continuously (re)constituted and (re)shaped crime of aggression norm disciplines the political and generates, also continuously, new political strategies and therefore also new legal strategies.

This performative and constitutive aspect of norm construction is exactly what Putin employed when he invoked Kosovo as a precedent for Crimea. Even though he had openly objected to that same interpretation before, he used this argument now to fend off Western objection to Russia's annexation of Crimea in 2014. Putin used the Kosovo situation as a precedent to buttress his position, with the goal to present Russia's role in Ukraine as being in accordance with international law. With it, Putin creates another 'precedent' that may be invoked by whomever wants to argue for the lawfulness of a similar situation in the future.[667]

The Crimea crisis illustrates also the various ways in which international law can be invoked in an effort to strengthen a position with law's disciplining power. According to Russia, its role in Ukraine was merely to protect 'their compatriots' against violations of international law. Moreover, Putin claimed that NATO's role in the Kosovo situation provides a precedent for the legality of this use of force, thereby adopting a responsibility to protect-type argumentation. Furthermore, Putin claimed that the people of Crimea and Eastern Ukraine are exercising their right to self-determination, again in similar manner as those of Kosovo did when they declared independence, and that Russia merely supports them in executing the independence they chose in their referendum and thus in fulfilling their human right.[668]

---

[667] In his speech of 18 March 2014, when he announced that Crimea was annexed, Putin argued:
'Moreover, the Crimean authorities referred to the well-known Kosovo precedent – a precedent our western colleagues created with their own hands in a very similar situation, when they agreed that the unilateral separation of Kosovo from Serbia, exactly what Crimea is doing now, was legitimate and did not require any permission from the country's central authorities. Pursuant to Article 2, Chapter 1 of the United Nations Charter, the UN International Court agreed with this approach and made the following comment in its ruling of July 22, 2010, and I quote: "No general prohibition may be inferred from the practice of the Security Council with regard to declarations of independence," and "General international law contains no prohibition on declarations of independence." Crystal clear, as they say. I do not like to resort to quotes, but in this case, I cannot help it. Here is a quote from another official document: the Written Statement of the United States America of April 17, 2009, submitted to the same UN International Court in connection with the hearings on Kosovo. Again, I quote: "Declarations of independence may, and often do, violate domestic legislation. However, this does not make them violations of international law." End of quote. They wrote this, disseminated it all over the world, had everyone agree and now they are outraged. Over what? The actions of Crimean people completely fit in with these instructions, as it were. For some reason, things that Kosovo Albanians (and we have full respect for them) were permitted to do, Russians, Ukrainians and Crimean Tatars in Crimea are not allowed. Again, one wonders why.'

[668] In his speech on 18 March 2014 on Crimea, Putin moreover said:
'We accommodated Ukraine not only regarding Crimea, but also on such a complicated matter of the maritime boundary in the Sea of Azov and the Kerch Strait. What we proceeded from back then was that good relations with Ukraine matter most for us and they should not fall hostage to deadlock

Conversely, Ukraine accused Russia of committing aggression, pointing to the 1974 UN General Assembly Definition of Aggression and Article 8*bis*(2)(a) of the Rome Statute that acts of aggression include the annexation of territory of another state by using force and Article 8*bis*(2)(c) that provides that the blockade of ports by the armed forces of another state qualifies as an act of aggression.[669] Although many states supported Ukraine and announced economic sanctions against Russia in response to its role in Ukraine, very little happened otherwise, and Crimea is (at least) *de facto* part of Russia. This is also the likely prospect of parts of Eastern Ukraine at the time of writing.

Russia's (allegedly aggressive) annexation of Crimea comes four year after Kampala; four years after the historic consensus agreement between the states parties to the Rome Statute that the crime of aggression is a *malum in se* and one of the most serious crimes of concern to the international community as a whole. Although Russia is not a state party to the ICC, it is party to the UN which was created around the prohibition to use aggressive use of force and that adopted the definition of aggression in 1974 by consensus. Even though international law has become the vernacular of international politics and disciplines argumentative structures around use of force, its normative force to restrain states from acting aggressively and for holding states accountable appears weak, even after the crime of aggression amendment will become operative at the ICC. Although law therefore comes with its disciplining force, this force does not necessarily work in the way that legalists hope, in restraining states from acting in ways that is believed to amount to aggression.

Nevertheless, the disciplining power of law cannot entirely be dismissed either and it can arguably be said to contain some normative force in terms of deterring individuals from engaging in aggressive warfare. Benjamin Ferencz, who was quoted earlier in this book on his speech during the ICC Review Conference that urged delegates to come to an agreement on the crime of aggression and is a famous protagonist for criminalizing aggression, said in an interview that the crime of aggression already has had a deterrent effect.[670] He referred to the cabinet meeting of UK Prime Minister Tony Blair after he had come back from Washington where US President George W. Bush had conveyed to him that he had decided that they would need to change the government in Iraq by use of force. Bush had asked Blair whether the UK was with him or against him, and Blair told him that the UK would be with him. Yet, once

---

territorial disputes. However, we expected Ukraine to remain our good neighbor, we hoped that Russian citizens and Russian speakers in Ukraine, especially its southeast and Crimea, would live in a friendly, democratic and civilized state that would protect their rights in line with the norms of international law.
However, this is not how the situation developed. Time and time again attempts were made to deprive Russians of their historical memory, even of their language and to subject them to forced assimilation. Moreover, Russians, just as other citizens of Ukraine are suffering from the constant political and state crisis that has been rocking the country for over 20 years.'

[669] Satellite images show how that from 10 March 2014 onwards, Russian vessels blocked the port of Sevastopol for Ukrainian traffic but not for the Russian fleet.

[670] This interview with Benjamin Ferencz is entitled 'LAW not WAR' and this section of it commences at 54:25. It is available via https://vimeo.com/125533174.

returned to London and discussing this with his cabinet, Blair was asked by the UK military leadership for a legal opinion on the matter before sending out troops, as they were uncomfortable with sending out troops to engage in an aggressive war. Here, Ferencz points out, the deterrent effect of the disciplining power of law comes to the surface. As was also discussed in Chapter 3, the requested legal opinions came from Attorney-General Lord Goldsmith and Deputy Legal Adviser of the Foreign Affairs Department Elizabeth Wilmshurst who both pointed to the illegality and aggressiveness of the undertaking, another example of law's disciplining power. However, because Blair had already promised UK's collaboration wanted to stay this course, a legal opinion was sought (and found) that would instead argue that using force against Iraq would be lawful, Ferencz narrates. The new legal opinion was conducted under the responsibility of the same Attorney-General Lord Goldsmith, who had changed his mind, and which now stated that 'an argument could be made that it is lawful.' Subsequently, the US and the UK jointly invaded Iraq and Elizabeth Wilmshurst resigned her post after 30 years of foreign service because she did not want to support a government that committed aggression.[671]

8.2 Indeterminacy

This 'an argument could be made that it is lawful'-statement points also to the second materialization of the relationship between law and politics that this book has highlighted, namely that the aggression norm is indeterminate and hence open enough to argue diametrically opposed positions on the basis of legal arguments. Realists would understand this statement as proof that 'politics trumps law.' However, as this book argues, politics does not 'trump' law, but uses law as a means, or language, to engage politics in.

The book developed the argument that legalization and the use of legal language does not overcome the fundamentality of the disagreement over the deeply contested issue of what is and what is not aggressive use of force. And, that when a decision is made to intervene, 'suitable' legal argumentation can be found to buttress the legality claims of military actions. International law reflects what is agreed on (whether this is understood as requiring expressive state consent or as a consequence of being part of a natural moral community) and is limited where disagreement prevails. Where situations are fundamentally disagreed on, international law contains a limited mediating capacity between opposing substantive claims. Consequently, when the aggressiveness of a particular situation is contested, law cannot overcome and mediate between opposite claims.

[671] The letter of resignation of Elizabeth Wilmshurst of 18 March 2003 was released by the Foreign Office to the BBC News website under the Freedom of Information Act, and is available at http://news.bbc.co.uk/1/hi/uk_politics/4377605.stm, last visited on 17 June 2015.

Hence, since fundamental disagreement persists as to what force is aggressive and what not, the textual provision of a 'norm' that finds consensus agreement among those that disagree needs to be open enough to contain argumentative space for all those mutually exclusive positions. For example, as Chapter 3 discusses, the use of force paradigm that underpins the crime of aggression allows justificatory language for use of force using what I have called a 'justice' rationale as well as a 'necessity' rationale. While the 'justice' rationale requires a prior violation of a *right* in order to use force, the 'necessity' rationale looks at whether use of force is *necessary* for one or another reason. The right to self-defense in the 'justice' rationale, for instance, requires that the use of force responds to an armed attack that is attributable to a state and qualifies use of force as aggression when the violence that is responded to is not attributable to a state. In this rationale, using force abroad against terrorist groups without consent of the state on whose territory force is used is a violation of international law, possibly amounting to aggression. In contrast, the 'necessity' rationale requires no such prerequisite violation of a formal right but allows self-defense when it is necessary to protect against violence even if it is, for example, committed by a non-state actor, as long as it threatens a vital aspect of the state and no other means are available. The use of force paradigm provides support for both positions even though these rationales are mutually exclusive. Either use of force in self-defense is illegal (and perhaps a crime of aggression) because there was no prior violation of a right in the sense of an armed attack that is attributable to a state even though it was necessary to react militarily against it, or it is not illegal. But logically speaking it cannot be both. Yet, argumentative practice uses both rationales, and it is not clear which would be 'the' right understanding of the right to self-defense. Instead, practice shows that both interpretations are maintained, to allow more flexibility to buttress one's activities with legal argumentation, whichever position one needs to argue in whichever situation. States themselves flip between rationales, from situation to situation. Consequently, it renders the crime of aggression norm open enough to argue either way.

Similarly, the crime of aggression also allows argumentative space for both arguing that use of force is aggression or non-aggression on the basis of what is considered 'the good' that the UN Charter is to protect. This is reflected in the crime of aggression's 'manifest violation'-criterion, which was discussed in detail in Chapter 4. As discussed, there are two interpretations of the 'manifest violation'-criterion. To use the Ukraine situation again as illustration, if the interpretation is taken so that 'manifest' is meant to separate interventions that are for the 'good' and thus 'legitimate' from those that are not, the criminality of the situation depends on reasoning such as, for example, whether or not one accepts Putin's 'responsibility to protect'-argument. This argument holds that the people of Crimea were undergoing such serious violations of their human rights that there was no other means than to intervene militarily and that this was done to protect them. Or that even if there were perhaps other ways, this was the better way, and therefore legitimate under the circumstances at hand. Or that, in line with Putin's invocation of the Kosovo situation

as precedent, it could not be said that assisting a self-determination movement amounts to a manifest violation of the UN Charter. Or that Putin's self-defense argument, acting against threats to its influence sphere and therefore sovereignty, is, although perhaps illegal, not manifestly in violation of the UN Charter.[672]

The other interpretation of the 'manifest violation'-criterion excludes from the scope of the crime of aggression all situations for which there is an *argument* that the use of force was lawful, because the lawfulness would then be contested, and thus not a 'manifest' violation of the UN Charter. Following this interpretation, the applicability of the crime of aggression encounters the boundaries of what counts as a legal argument. As pointed out before, any skilled lawyer is able to make a legal argument in many a situation. In the Crimea crisis, Putin used almost word for word the legal argumentation that Western states used to recognize the independence of Kosovo and to justify the NATO bombings. Dismissing the *type* of arguments as not being legal arguments means similarly dismissing the argumentation around Kosovo. Under this reasoning, the Crimea situation would not be aggression because a legal argument could be made to its lawfulness, making it therefore contested, and thus not a 'manifest' violation of the UN Charter. However, dismissing the Crimea situation from the scope of the crime of aggression raises the question what the crime of aggression is for if not to provide for situations like these.

Consequently, those opposing Russia's actions in Crimea but supporting NATO's actions in Kosovo raise arguments such as that Kosovo was a *sui generis* case, that it did not provide precedent for other situations, and that the situation in Kosovo was unique, and in any case, that the situation in Crimea did not compare because the human rights violations in Crimea were not as grave. This brings us back to the discussion of which use of force is properly for the 'good' and which isn't,

[672] In his 4 December 2014 Presidential Address to the Federal Assembly, Putin submitted that Russia has an absolute need for sovereignty. He said, '[i]f for some European countries national pride is a long-forgotten concept and sovereignty is too much of a luxury, true sovereignty for Russia is absolutely necessary for survival' (Speech Russian President Putin delivered on 4 December 2014. Full English translated text available at http://en.kremlin.ru/events/president/news/47173 (last visited on 13 May 2015)). In his end of the year televised question and answer appearance on 18 December 2014, Putin explained this geopolitical strategy further by using a 'bear-in-the-forest'-metaphor, referring to Russia's national symbol. 'Sometimes I think, maybe they'll let the bear eat berries and honey in the forest, maybe they will leave it in peace,' Putin contemplates. He then continues by saying '[t]hey will not. Because they will always try to put him on a chain, and as soon as they succeed in doing so they tear out his fangs and his claws. Once they have taken out his claws and his fangs, then the bear is no longer necessary. He will become a stuffed animal.' And then tying it back to Crimea, Putin says, '[t]he issue is not Crimea, the issue is that we are protecting our sovereignty and our right to exist.' He finished the metaphor by asking the Russian audience whether they would prefer the Russian bear to just become a stuffed animal (For English translated excerpts of the television interview of 18 December 2014, see for example, http://www.independent.co.uk/news/world/europe/putin-speech-president-says-russian-bear-wont-be-chained-by-the-west-as-he-warns-of-tough-two-years-ahead-9934532.html (last visited on 13 May 2015). With this speech, Putin applied a self-defense rationale to justify its activities in Ukraine: if Russia would not have acted in Ukraine, it would have lost an important part of its ability to protect its way of life and the survival of the Russian influence over states it regards as part of its realm or empire.

encountering problems surrounding what is 'the good,' for whom, and who gets to decide this.

In most disputes about international law there is no final interpreter of what law is and what these highest norms are in the form of a court such as the ICJ or ICC. Jurisdiction for cases before the ICJ depend on the consent of the states that are involved. Moreover, as is discussed in Chapter 4, obtaining jurisdiction for the ICC over a case of aggression will also be difficult and sheer impossible when it comes to the actual powerful states because they can block such prosecutions through the Security Council and the opt-out procedure that the crime of aggression amendment provides. The cases that therefore do arrive before an adjudicatory bench will be few in comparison to the vast array of interpretive disputes that exist over the use of force norm. Therefore, the application and interpretation of the norm lie in the hands of states and other contributors to norm interpretation, reflecting the many different views that came to the fore in the processes to define aggression.

This makes a criminal law norm like the crime of aggression problematic because criminal law justifies its vertical imposition of coercive measures on the basis of the foreseeability of the criminality of conduct prior to it being undertaken. Yet the crime of aggression is open enough to include fundamentally differing interpretations of what aggression is and practically toothless in many situations when it comes to holding those responsible accountable. Because of this openness, it can easily be used to accuse another of committing aggression and thus violating the highest norms to win support for one's position. The crime of aggression is therefore the very opposite of irrelevant or without consequence.

8.3 Proceduralization

In addition to the crime of aggression's disciplinary power and its indeterminacy, the study also showed that the choice for seeking law's disciplinary force despite fundamental substantive contestation led to a recurring dynamic of proceduralization and the delegation of substantive disagreement elsewhere, to other *fora*, such as the judges of the ICC and others that partake in the norm development of the crime of aggression. In the legislative process, despite a lack of genuine agreement on what distinguishes aggression from non-aggression, a crime of aggression amendment was nevertheless adopted, on the basis of finding consensus on *how to* deal with it, rather than *dealing* with it. Yet in this process, finding agreement on procedures rather than substance while presenting these as successful agreements on substance led to a veiling of fundamental disagreements behind legal provisions. Moreover, it delegates the actual and fundamentally contested question of what aggression is to judges and other interpretive communities.

This may be seen as a different type of 'law'-creation than the more traditional manner in which (domestic) criminal law is usually seen to be created in liberal democracies. Here, rather than providing the judiciary with the task to adjudicate conduct that has been decided by society's legislature as criminal, and providing as much as possible determined rules that are to be specified on a case-by-case basis, the crime of aggression amendment leaves open the core of what aggression distinguishes from non-aggressive use of force, and provides no meta-criteria that could guide the making of this distinction. It delegates elsewhere to decide what states could not agree on: to the judiciary, civil society, public opinion. Perhaps this is an attempt to see whether that can provide the circumstances to resolve these issues and generate *communis opinio* in an organic and incremental way. In the urge to 'legalize' the norm of aggression further, perhaps what we are witnessing is a creation of international criminal law in which legislation is deferred almost entirely.

Delegating the role of the legislature to such an extent to the judiciary in the field of *criminal* law, however, raises a number of concerns regarding fundamental criminal law principles, including the principle of legality, precisely because of this openness. If this is what is occurring, the traditional role of the principle of legality in criminal law seems to be diminished or at least adjusted and the essence of a fair application of criminal law reconsidered in favor of a moralization and repudiation of the other, the opponent. As discussed in Chapters 5 and 6, the crime of aggression thereby raises a tension with the justification for criminal law's vertical rationale in which the system employs its power vis-à-vis the accused individual.

In a liberal and idealist conception of law, what law, and particularly criminal law, is usually used for, is to translate a particular society's views on order and socio-political justice into a legal system that can then be applied with a sufficient level of satisfaction by the individuals in the particular society to accept where the particular lines/rules are drawn. This is done to enable the individuals in a society to know and accept what falls on the allowed side of the rule and what on the prohibited or criminal side of it sufficiently for them to accept the system as a whole. This is always challenged by the overinclusiveness and underinclusiveness of rules. As was discussed previously, every rule is both inherently overinclusive because it always includes situations that would have rather been left outside of the scope of the rule as well as inherently underinclusive for it also will always exclude situations that would have been preferred to be included. This is inherent in the difficulty of crafting abstract legal rules in a complex and evolving society, and is pertinent in all legal systems.[673]

In international law, however, this poses more problems than in domestic societies, even though disagreements, even fundamental ones, on how a rule should be drawn also exist on the domestic level. On the international level, however, the consequences

[673] See for an insightful analysis of how every rule is both over- and underinclusive Frederick Schauer, *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press, 1991).

of the over- and underinclusiveness of the rule and the consequences of rule-following and rule-disobedience are often experienced as unacceptable. And as was discussed in Chapters 2 and 7, for the issue of the ability to use force, the intensity of those consequences are at the high end of those experienced in global interaction. To not be able to resort to war if one believes its very survival or way of life is at stake because of some abstract rule telling that it cannot will likely not only lead to a neglecting of that rule but also of a denial that it *can exist*.

The crime of aggression amendment presumes a distinction between right and wrong, good and bad, as well as the ability to distinguish between them. It also presumes near universally agreed upon translations of good and bad into desirable and undesirable uses of force. It presumes to reside in a society that is bound by universally applicable criminal law provisions, on which that society agrees to large extent regarding what conduct is considered a *mala in se*, comparable to a domestic society with a functioning criminal law system that holds certain legitimacy in that society. In such societies, the level of agreement doesn't need to include every single one's opinion, but needs to be sufficiently broadly agreed upon to prevent uprising against the state for using its coercive powers along the lines prescribed by its criminal law.

Moreover, the intensity of disagreements needs to be kept limited. If disagreement with the manner in which the criminal law is administered causes large emotional or moral disapproval, for instance because someone who is found guilty of a crime that moved society deeply gets a low punishment, someone is convicted of a crime where society believes he acted correctly, or where a case is dismissed on technical errors that society may disagree with, the criminal law of a society will be contested. In democratic or otherwise responsive societies, this may then lead to legislative or policy amendments, in order to bring the criminal law in line with society's socio-political ideals about order and justice.

In the international context, however, all of this proves to be more challenging, if not impossible. Plurality is more widespread and disagreement more fundamental, leading to deeper contestation about crimes that are *mala in se* and *mala prohibita*. Moreover, the administration of international criminal justice and its enforcement leaves much to be desired, and legislative change remains extremely challenging in the political climate in which it functions.

Most fundamentally, however, the tension between criminal law and the aggressiveness of war lies in criminal law's inherent vertical relation between the law-enforcer and the criminal and its presumption of the ability to distinguish good from bad. In their vertical relation, the law-enforcer acts on behalf of society and is empowered to use means not available to the criminal, in order to stop the commission of crimes and punish the perpetrator(s) for it. The criminal, on the other hand, is the outcast of society and has placed himself in a dark corner of society by consciously committing acts that are criminal, the rationale goes. This vertical relationship is typically embodied by an acceptance of a difference in means, both in

getting the alleged perpetrators into the dock and during the judicial proceedings. But due to the flimsiness of the distinction between 'illegal but legitimate' and 'aggressive' use of force, the justification for this verticality becomes dubious, morality gets imposed through power and disguised as law, leading more likely to further inequality, exclusion and entrenchment of conflicts than the utopian aspiration of world peace.

8.4 Entrenchment

This latter observation bridges to the fourth manifestation of the law/politics-relationship that was observed in this study on the criminalization of aggression project. Namely, that the crime of aggression may well contribute to a further entrenchment of positions in conflicts rather than resolve them. Regulating and criminalizing a fundamentally contested issue without reaching substantive agreement may entrench such disagreement by enforcing contested positions with the power of law. Disagreement is no longer the holding of a different view but becomes an alleged 'mistaken understanding' of the law. Moreover, the morality that comes from international criminal law's presentation as addressing crimes that are inherently criminal and blameworthy, *mala in se* crimes, and only the most serious of those, adds a further moral layer to this entrenched disagreement. Not only is the position of the other disagreed with and an alleged mistaken interpretation of the law, it also represents evil: it tries to justify a crime that belongs to the most serious crimes of concern to mankind, and a crime against all, *erga omnes*. This may further entrench contestation, which, for example, may make negotiated settlement or compromise even harder to find.

Moreover, in its current functioning, the ICC and the international criminal justice field is likely to contribute to entrenchment of contestation further when the crime of aggression is applied in situations where fundamental disagreement exists over the aggressiveness of the use of force deployed. The ICC and its proponents have a tendency to equate 'global justice' with accountability before a criminal tribunal. If a society cannot or does not want to bring those that have allegedly committed crimes that fall under the ICC's jurisdiction before a criminal court, the ICC may take over the situation, with the presumption that this serves the delivering of justice in that society. They are often inclined to assume that there can be no peace without 'justice,' by which they mean accountability in a criminal court of law. This then leads to the presumption that only by holding particular individuals accountable for their actions or omissions can a society start to recover and rebuild. It thereby not always takes enough into consideration what justice means for different people, and that 'justice' is as indeterminate a notion as any: it means different things for different people, is substantively void, and therefore open enough to include many interpretations, some of which diametrically opposed to one another.

The particular conception of justice as helping war-torn societies move on by holding those that are regarded as most responsible accountable before a court in The Hague has paradoxically spurred resistance against the Court and the international criminal justice project. Activists have emerged that are *against* the ICC and the international criminal justice project, condemning it as a (neo-)colonialist enterprise, only going after African states, following Western nationalist political agendas, and enforcing and enlarging existing power structures. They submit that this particular interpretation of 'justice' blocks peace by limiting the options for a negotiated peace and thereby prolongs conflicts. Both these ICC advocates and ICC opponents therefore counter-position peace and justice.

The new crime of aggression may pose another challenge in this interaction between both of these movements. When the ICC decides to intervene in a situation of aggression, the highly political nature of the crime of aggression is likely to invite criticism of the ICC from the side that believes the force to be just and/or necessary, if not a responsibility to protect, humanitarian and heroic. The side under criminal investigation is positioned as amoral enemy and criminal rather than opponent and equal partner at the negotiating table, potentially challenging the peace process. The 'ending impunity' policy that the international criminal justice project has adopted and advocates has as effect that those that find themselves in the position that sees the international criminal justice system aligned against it are less inclined to join the negotiating table if for them personally the only possible outcome is a single trip to The Hague. Consequently, criminal law's vertical rationale of identifying, individualizing and condemning norm violators may well provide tensions for public international law's rationale of managing risks and conflicts in international relations. Condemning one side as a violator of the highest norms when it is intensely disputed whether the force is just or instead aggression may at the same time bar the rehabilitation of states condemned as 'rogue.'[674] Moreover, international criminal trials may enhance the creation of martyrs of the accused, such as was recently seen in the Kenya situation where indictees of the ICC (Uhuru Kenyatta and William Ruto) actually gained domestic electoral support *because* of their status of being indicted. They were former opponents and are indicted by the ICC for their role in the 2007 and 2008 electoral violence. They joined forces in the following elections by turning the campaign into a struggle of Kenya (or Africa) against the 'neo-colonialist ICC enterprise,' that wanted to interfere with what Kenya could address themselves, or so they argued. Although large parts of Kenyan society opposed them and supported the ICC, enough people supported this anti-ICC campaign to vote them into office.[675] In 2013, Kenyatta and Ruto were elected into presidential and vice-presidential office.

[674] See for this argument also Gerry Simpson, *Law, War & Crime* (Polity, 2007), at 21.
[675] There are various monitoring reports that put the fairness of this election into question. However, whether or not a majority was obtained fairly or not, it seems at least clear that a large part of the Kenyan electorate voted for Kenyatta and Ruto.

8.5 Moving Forward: From Utopian Ideals to Recognizing Politics

The international criminal justice project is faced with various challenges, not the least of which a rather unhelpful discrepancy between what utopian ideals the international criminal justice is believed to be able to bring and what it actually can contribute. In its justification for existence, the ICC and its proponents have created unrealistically high expectations of what a court in The Hague can do in terms of addressing atrocity crimes throughout the world and ending impunity for them.[676] Credos like 'ending impunity' and 'delivering justice' would never be found credible in a domestic criminal law system, since all criminal law can do is strive after *reducing* impunity and *contributing* to feelings that justice is served, in close cooperation with other enforcement and support systems that aid these causes too. With the added complications that the transnational space brings, such strange and utopian promises should have no place in international criminal law.

If the nineties were characterized by great zeal for international criminal law's potential, that was able to spur an unprecedented revolutionary momentum in realizing a body of law that prosecutes and holds accountable those that commit the worst imaginable atrocities, the time is now ripe to scrutinize the normative foundations of the project. What is needed now is a more reflective understanding of the politics that international criminal law interacts with, which it generates and which it is generated by, to improve the project accordingly, and adjust expectations to a level that is achievable. Rather than raising false expectations, the international criminal justice project would do better to be more modest and strive to bring what it can within its capabilities. Rather than veiling in legalist assumptions the political realities that international criminal justice cannot escape, and rather than imposing its own creations of universal justice, it should instead consider thoughtfully and earnestly the limitations of the crime of aggression, and through it, come to an appreciation of what it *can* bring.

With regard to the rationales of punishment, Chapters 5 and 6 discussed some of the main limitations that the crime of aggression has when it comes to achieving retributive, preventive and expressive effects. However, even if retributive, preventive and expressionist theories of punishment for aggression thus bring problems for justifying the application of a vertical system of prosecution and punishment vis-à-vis states or individuals, this is not sufficient to say that applying law to aggression and even criminal law to aggression is necessarily a bad thing that should absolutely be left aside. Further and specific study into the effects of the criminalization and future adjudication is required to make and buttress such claims. Normatively, all that rests

[676] See for a critique on the abundance of goals that the international criminal justice project proclaim, Mirjan Damaška, 'What Is the Point of International Criminal Justice?' (2008) 83 *Chicago Kent Law Review* 329-368. He observes that 'the problem of goals' of international criminal law lies in their overabundance and therefore impossibility to achieve all, the tensions that come from the incompatibility of these goals, and the competence that a judicial court has in setting an accurate historical record.

us here is to make inferences on the basis of logical reasoning which signal a number of issues of concern and not an entirely clear benefit to justify the venture. However, perhaps there are other compelling reasons to justify the crime of aggression. Perhaps retribution may provide a justifying effect in some cases, when victims of aggressive use of force eventually see a state leader be held accountable, disempowered and disappear behind bars. Or the limited deterrent effect that in some situations, some leaders take a stand and refuse to support force that they regard to be aggressive. Or perhaps the expressivism of shared moral repudiation as described by Drumbl,[677] or the symbolism and religious exercise of hope in international criminal justice suggested by Tallgren[678] tilt the scale in favor of applying criminal law to aggression. Tallgren suggests that rather than thinking about the international criminal justice system in terms of utility and rationality, it can be understood as a symbol and a model; showing the way for national systems, echoing the values of the 'international community,' being used as a tool in negotiations, as the message preceding or following military interventions, and setting the standards of tolerable conduct by sending *ex ante* messages, even if *post facto* sanctioning may never occur.[679] Yet, an international criminal justice system based on symbolic validation leads to a politics of tokenism, void from a concrete vision of what international criminal law strives for and aspires to be in search of assisting war-torn communities to move forward; void from a vision on which values to prioritize over others, which rationales to follow at the cost of others, which interpretation trumps another. A struggle over interests at least allows contested political views to be expressed and argued for and against; it allows the possibility to compromise, where a politics of symbolism and tokenism or the denial of the inherent political nature of the international criminal justice system excludes such open debate, open contestation, open argumentation, and balanced weighing of what is at stake and what could be the best way forward, all things considered.

Perhaps possible beneficial effects will outweigh the more problematic consequences that the crime of aggression brings. The future will tell. But in order to enhance those positive effects and reduce the negative ones it is important to appreciate the crime of aggression as an inherently political norm. As a norm that is produced through a particular political context in a moral pluriverse. That it is therefore constructed in a particular way that includes various interpretations and thus allows contestation to continue. That it thereby generates a particular kind of politics that enables the labeling of the opponent as criminal, rogue and outlaw. That due to this, positions are entrenched rather than resolved, unless it is possible to create the circumstances for a judicial ruling that can be accepted by all involved as fair and not a show trial, or resolve the dispute in other ways.

---

[677] Mark A. Drumbl, 'The Push to Criminalize Aggression: Something Lost Amid the Gains?' (2009) 41 *Case Western Reserve Journal of International Law* 291-319.
[678] Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *European Journal of International Law* 561-595, at 592-594.
[679] Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *European Journal of International Law* 561-595, at 591-592.

Giving the crime of aggression a chance to function in a way that contributes to the goals it sets out with instead of undermining them fatally requires from the international criminal justice field introspection into the politics it represents and generates and openness of what choices it makes and for what reasons it does so rather than hide it behind an unhelpful and unconvincing legalist camouflage. And it is helped by more modesty in what it claims to be able to do in order to prevent false expectations to turn into disappointment and rejection. Perhaps the next phase of the international criminal justice project will then be able to build on what has been established so far, and focus on understanding what plurality entails for the pursuit of justice on a global scale, with the recognition that justice means different things for different people that seek it. Rather than the enemy of law, the political is its natural partner, and should be embraced as a way to improve law, explain law, enforce law, speak law and act in accordance with law, in order to contribute to justice, peace and security.

SUMMARY

During the 2010 Review Conference in Kampala, delegations from the member states of the International Criminal Court (ICC) came to a consensus agreement to include the crime of aggression into the jurisdiction of the ICC. They decided that in the future, the ICC could become able to address situations of aggressive use of force by prosecuting state leaders for planning, preparing, initiating or executing aggressive resort to armed force against other states.

This dissertation discusses this new development for the notion of aggression by telling two stories. The first story is that of the regulation and criminalization of the notion of aggression. This narrative explores how the right of states to resort to force has changed over the past 100 years into a crime of aggression, and how this process saw several repeating dynamics of contestation, postponement, diplomatic maneuvering, proceduralization, and delegation of substantive decisions off the diplomats' table. The second story tells of the different ways in which the relationship between law and politics materializes in these discussions on aggression. It describes how the regulation and criminalization of aggression can be read as a story about seeking law as a means to suspend the politics of decisions on use of force. This second story reframes the first, and draws attention to how the regulation and criminalization of aggression (the first story) shows how law and politics relate to and mutually (re)constitute one another.

The main research questions are therefore, first, how the Kampala crime of aggression amendment came into existence and came to be constructed as it is. And second, in what ways law and politics relate to one another and what kinds of law and politics are produced in the construction of the crime of aggression. Law and politics are not meant here as separate realms. Rather, the research is about how, in the regulation and criminalization of aggression, political contexts produce particular kinds of legal constructs and how these kinds of legal constructs generate particular kinds of politics. The research is therefore about the law generated by the politics of regulating aggression and about the politics that is generated through this legal construction, and thus about how law and politics co-constitute each other in the construction of the crime of aggression.

The main argument that is developed in this dissertation is that the discourse and argumentative practices on use of force and aggression demonstrate both the legalists' and the realists' arguments on the relationship between law and politics. On the one hand is the legalist idea that law is able to discipline politics, that it binds and restrains states in their actions, and that it produces a legal framework that consists of rules that discipline what is and what is not an accepted argument. On the other there is the realist idea of law as an empty veil of politics, or in other words, that law is inherently and entirely political and therefore not able to restrain the political. Discussions often present these two understandings of the relationship between law and politics as a

dichotomy, and both legalist and realist literatures tend to focus on disproving the other logic. However, this book shows how rather than a dichotomy, both of these conceptions of law/politics co-exist and are interdependent with one another.

The dissertation is based on discourse analysis of the use of force paradigm and the process of regulating and criminalizing the notion of aggression. Discourse and argumentative practices show that the law on aggressive use of force is inherently political. It cannot overcome this by suspending politics and replacing it with an objective rulebook providing what is and is not aggression. That issue is and remains deeply contested, and this fundamental disagreement cannot be resolved by using the language of law. Nevertheless, this does not mean that law becomes valueless, nor that law has no disciplining power. Use of force discourse also shows, for example, that discussions on use of force have become almost exclusively legalized. Arguments of morality or political interest have been replaced by arguments that invoke one or another legal source. With this adoption of the legal language comes the power of law that disciplines what is and is not recognized as following the *legal* logic and as *legal* argument. Consequently, some positions loose merit, others gain standing. And because of this performative dynamic, new interpretations and arguments constitute new realities, which invites new contestation, leading to new positioning, and so the dynamic goes on and on. Therefore, there appears to be a certain (discursive) disciplining power in law even if this does not overcome fundamental substantive disagreement.

Moreover, the interdependence of these two logics leads to the proceduralization of norms on which there is fundamental substantive disagreement. Throughout the regulatory history of the notion of aggression this phenomenon can be observed. As this dissertation discusses, repeatedly, substantive disagreement on what aggression is and thus on where to draw the line between aggression and non-aggression led to seeking agreement on procedures on how to deal with resolving such a dispute, but elsewhere than on the diplomats' table. It led to finding consensus on *how to* deal with it, rather than *dealing* with it.

In addition, legalization of a fundamentally contested issue without reaching substantive agreement can also entrench such disagreement by enforcing contested positions with the power of law. Disagreement is no longer the holding of a different view but becomes an alleged 'mistaken understanding' of the law. In addition, the morality that comes from international criminal law's presentation as addressing crimes that are inherently criminal and blameworthy, the *mala in se* crimes, and only the most serious of those, adds a further moral layer to this entrenched disagreement. Not only is the position of the other disagreed with and an alleged mistaken interpretation of the law, it also represents evil: it tries to justify a crime that belongs to the most serious crimes of concern to mankind, and a crime against all, *erga omnes*. This further entrenches contestation, which, for example, may make negotiated settlement or compromise even harder to find.

This book does not advocate a normative agenda *for* or *against* the crime of aggression or propose a (better) legal provision that would tackle the challenges it identifies and discusses. It rather aims to provide an analysis of the nature, abilities and limitations of the crime of aggression that might contribute to the development of the international criminal justice field. The international criminal justice field is currently in the process of exploring how best to deal with the new crime of aggression. This book aims to contribute to this development by offering an analysis of the notion of aggression to its conceptual core and by tracing its historical roots, beyond its mere jurisprudential application in a court of law. Only by understanding the law and politics of the notion of aggression can a sensible effort be undertaken to work with the crime of aggression in striving for the highly ambitious aims that it is associated with: such as contributing to the suppression of aggressive war, to maintaining peace and security, to ending impunity for those engaging in aggressive use of force, and to seeking justice for those that are affected by aggression. Striving after socio-political goals like these with a legal notion that regulates the most political decision a state has (resorting to force to protect its way of life, in narrower or broader interpretations thereof), requires a profound understanding of the interaction of law and politics and how their interaction has (re)constituted and (re)shaped the notion of aggression throughout history to arrive at the crime of aggression amendment that was adopted in Kampala.

BIBLIOGRAPHY

Historical Review of Developments Relating to Aggression United Nations, 2003),

Netherlands Yearbook of International Law. Necessity across International Law T.M.C. Asser Instituut, 2010), vol. 41

Aalberts, Tanja, *Constructing Sovereignty between Politics and Law* Routledge, 2012),

Aalberts, Tanja, 'Sovereignty', in Berenskoetter, Felix (ed.), *Concepts in World Politics* (Sage, 2015),

Adler, Emanuel & Vincent Pouliot, 'International Practices' (2011) 3 *International Theory* 1-36

Akande, Dapo, 'International Law Immunities and the International Criminal Court' (2004) 98 *American Journal of International Law* 407-433

Allott, Philip, 'State Responsibility and the Unmaking of International Law' (1988) 29 *Harvard International Law Journal* 3-26

Allott, Philip, 'Reconstituting Humanity. New International Law' (1992) 3 *European Journal of International Law* 219-252

Ambos, Kai, 'The Crime of Aggression after Kampala', in *German Yearbook of International Law* (Berlin: Duncker & Humblot, 2010), pp. 463-511

Andenaes, Johannes Bratt, *Punishment and Deterrence* University of Michigan Press, 1974),

Anderson, Kenneth, 'The Rise of International Criminal Law: Intended and Unintended Consequences' (2009) 20 *European Journal of International Law* 331-358

Anderson, L. S. , T. G. Chiricos & G. P Waldo, 'Formal and Informal Sanctions: A Comparison of Deterrent Effects' (1977) 25 *Social Problems* 103-112

Anghie, Antony, *Imperialism, Sovereignty and the Making of International Law* Cambridge University Press, 2007),

Aquinas, St. Thomas, *Summa Theologiae, Secunda Secundae, Quaestio 40, 1* 35 Blackfriars ed., 1972),

Arendt, Hannah, *Eichmann in Jerusalem: A Report on the Banality of Evil* Penguin Books, 2006),

Ashworth, Andrew, 'Introduction', in Snare, Annika (ed.), *Beware of Punishment: On the Utility and Futility of Criminal Law* (Pax Forlag, 1995),

Augustine, St., *De Civitate Dei Contra Paganos, Book Xix, Para. Vii* 6 Loeb Classical ed., W.C. Greene transl., 1960),

Bagaric, Mirko & John Morss, 'International Sentencing Law: In Search of a Justification and Coherent Framework' (2006) 6 *International Criminal Law Review* 191-255

Barriga, Stefan, 'Negotiating the Amendments on the Crime of Aggression', in Kress, Barriga & (ed.), *The Traveaux Préparatoires of the Crime of Aggression* (New York: Cambridge University Press, 2012), pp. 3-57

Barriga, Stefan, Wolfgang Danspeckgruber & Christian Wenaweser, *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003-2009* Lynne Rienner Publishers, 2009),

Bassiouni, Cherif, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 *Law and Contemporary Problems* 9-28

Bassiouni, Cherif, 'From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Criminal Court' (1997) 10 *Harvard Human Rights Journal* 11-62

Beresford, Stuart, 'Unshackling the Paper Tiger - the Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2001) 1 *International Criminal Law Review* 33-90

Blokker, Niels, 'Is the Authorization Authorized? Powers and Practice of the Un Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'' (2000) 11 *European Journal of International Law* 541-568

Blokker, Niels, 'The Crime of Aggression and the United Nations Security Council' (2007) 20 *Leiden Journal of International Law* 867-894

Blokker, Niels & Claus Kress, 'A Consensus Agreement on the Crime of Aggression: Impressions from Kampala' (2010) 23 *Leiden Journal of International Law* 889-895

Boer, Lianne, ''Echoes of Times Past': On the Paradoxical Nature of Article 2(4)' (2014) *Journal of Conflict & Security Law* 1-22

Boister, Neil & Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* Oxford University Press, 2008),

Borgen, Christopher J., 'The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia' (2009) 10 *The Chicago Journal of International Law* 1-34

Bottoms, A. & A. Von Hirsch, 'The Crime Preventive Impact of Penal Sanctions', in Cane, P. & H. Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2011),

Boyle, James, 'Ideals and Things: International Legal Scholarship and the Prison-House of Language' (1985) 26 *Harvard International Law Journal* 327-359

Broms, Bengt, 'The Definition of Aggression' (1977) 154 *Recueil des Cours*

Broomhall, Bruce, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* Oxford University Press, 2003),

Brunnée, Jutta & Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* Cambridge University Press, 2010),

Buchanan, Allen & Robert O. Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 *Ethics and International Affairs* 405-437

Bull, Hedley, 'Natural Law and International Relations' (1979) 5 *British Journal of International Studies* 171-181

Burke, Ciarán, *An Equitable Framework for Humanitarian Intervention* Hart Publishing, 2013),

Cassese, Antonio, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *European Journal of International Law* 2-17

Cassese, Antonio, 'Reflections on International Criminal Justice' (1998) 61 *The Modern Law Review* 1-10

Cassese, Antonio, 'Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 *European Journal of International Law* 23-30

Castellino, Joshua, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial National Identity* Springer, 2000),

Crawford, James & Martti Koskenniemi, 'Introduction', in Koskenniemi, James Crawford & Martti (ed.), *The Cambridge Companion to International Law* (Cambridge University Press, 2012),

Creegan, Erin, 'Justified Uses of Force and the Crime of Aggression' (2012) 10 *Journal of International Criminal Justice* 59-82

Damaška, Mirjan, 'What Is the Point of International Criminal Justice?' (2008) 83 *Chicago Kent Law Review* 329-368

Danner, Allison Marston & Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 *California Law Review* 75-169

Darcy, Shane & Joseph Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press, 2010),

de Hoon, Marieke, 'Collateral Damage from Criminalizing Aggression? Lawfare through Aggression Accusations in the Nagorno Karabakh Conflict' (2012) 5 *European Journal of Legal Studies* 40-61

Dekker, Ige F. & Wouter G. Werner, 'The Completeness of International Law and Hamlet's Dilemma. Non Liquet, the Nuclear Weapons Case and Legal Theory' (1999) 68 *Nordic Journal of International Law* 225-247

Dekker, Ige F. & Wouter G. Werner, 'The Crime of Aggression and the Eritrea-Ethiopia Armed Conflict', in al., Andrea de Guttry et (ed.), *The 1998-2000 War between Eritrea and Ethiopia* (Cambridge University Press, 2009),

Der Derian, James & Michael Shapiro (eds.), *International/Intertextual Relations: Postmodern Readings of World Politics* (Lexington Books, 1989),

Derrida, Jacques, *Of Grammatology* Johns Hopkins University Press, 1976),

Doob, A. & C. Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice: a Review of Research* 143

Douglas, Lawrence, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* Yale University Press, 2001),

Drumbl, Mark A., *Atrocity, Punishment and International Law* Cambridge University Press, 2007),

Drumbl, Mark A., 'The Push to Criminalize Aggression: Something Lost Amid the Gains?' (2009) 41 *Case Western Reserve Journal of International Law* 291-319

Drumbl, Mark A., "Germans Are the Lords and Poles Are the Servants': The Trial of Arthur Greiser in Poland, 1946' (2013) *Washington & Lee Legal Studies Paper No. 2011-20*

Dubber, Markus, 'Common Civility: The Culture of Alegality in International Criminal Law' (2011) 24 *Leiden Journal of International Law* 923–936

Duff, R. Antony, 'A Reply to Bickenbach' (1988) 18 *Canadian Journal of Philosophy* 787 - 793

Dunlap Jr., Charles J., 'Lawfare Today: A Perspective' (2008) 3 *Yale Journal of International Affairs*

Evans, Gareth, *The Responsibility to Protect. Ending Mass Atrocity Crimes Once and for All* Brookings Institution Press, 2008),

Evans, Gareth & Mohamed et al. Sahnoun, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* International Development Research Centre, 2001),

Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts* T.M.C. Asser Press, 2006),

Ferencz, Benjamin B., *Defining International Aggression. The Search for World Peace, Vol. 1* Oceana Publications Inc., 1975),

Ferencz, Benjamin B., *Defining International Aggression. The Search for World Peace, Vol. 2* Oceana Publications Inc., 1975),

Ferencz, Benjamin B., 'Aggressive War: The Biggest Crime against Humanity' (2011) 43 *Studies in Transnational Legal Policy* 31-57

Fish, Stanley, 'Interpreting the Variorum' (1976) 2 *Critical Inquiry* 465-485

Fletcher, George P. & Jens David Ohlin, *Defending Humanity: When Force Is Justified and Why* Oxford Univeristy Press, 2008),

Friedrichs, Jörg & Friedrich Kratochwil, 'On Acting and Knowing: How Pragmatism Can Advance International Relations Research and Methodology' (2009) 63 *International Organization* 701-731

Gat, Azar, *War in Human Civilization* Oxford University Press, 2006),

Gazzini, Tarcisio , Wouter G. Werner & Ige F. Dekker, 'Necessity across International Law: An Introduction', in *Netherlands Yearbook of International Law. Necessity across International Law* (T.M.C. Asser Instituut, 2010), pp. 3-10

Glasius, Marlies, *The International Criminal Court. A Global Civil Society Achievement* Routledge, 2006),

Glasius, Marlies & Tim Meijers, 'Constructions of Legitimacy: The Charles Taylor Trial' (2012) *The International Journal of Transitional Justice* 1-24

Glennon, Michael J., 'The Blank-Prose Crime of Aggression' (2010) 35 *The Yale Journal of International Law* 71-114

Golder, Ben & Peter Fitzpatrick, *Foucault's Law* Taylor & Francis, 2009),

Graham, Angus C., *Later Mohist Logic, Ethics and Science* School of Oriental and African Studies, University of London, 1978),

Grasmick, H. G. , R. J. Bursik, Jr. & B. Arneklev, 'Reduction in Drunk Driving as a Response to Increased Threats of Shame, Embarrassment, and Legal Sanctions' (1993) 31 *Criminology* 41–67

Grasmick, H. G. & R. J. Bursik, Jr, 'Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model' (1990) 24 *Law & Society Review* 837–862

Greenawalt, Alexander, 'The Pluralism of International Criminal Law' (2011) 86 *Indiana Law Journal* 1063-1130

Grono, Nick & Adam O'Brien, 'Justice in Conflict? The Icc and Peace Processes', in Waddell, Nicholas & Phil Clark (eds.), *Courting Conflict? Justice, Peace and the Icc in Africa* (The Royal African Society, pp. 13-20

Guzman, Andrew T., 'Reputation and International Law' (2006) 34 *Georgia Journal of International and Comparative Law* 379

Guzzini, Stefano, 'A Reconstruction of Constructivism in International Relations' (2000) 6 *European Journal of International Relations* 147-182

Haas, Peter M., 'Introduction: Epistemic Communities and International Policy Coordination', in Haas, Peter M. (ed.), *Knowledge, Power, and International Policy Coordination* (The University of South Carolina Press, 1997), pp. 1-36

Hankey, Maurice Pascal Alers, *Politics, Trials and Errors* Henry Regnery Company, 1950),

Harmon, Mark & Fergal Gaynor, 'Ordinary Sentences for Extraordinary Crimes' (2007) 5 *Journal of International Criminal Justice* 683-712

Heller, Kevin Jon, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression' (2007) 18 *European Journal of International Law* 477-497

Henkin, Louis, *How Nations Behave. Law and Foreign Policy* Columbia University Press, 1968),

Hobbes, Thomas, *De Cive* Thomas Hobbes, 1642),

Hobbes, Thomas, *Leviathan or the Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil* Thomas Hobbes, 1651),

Hurrell, Andrew, 'International Society and the Study of Regimes: A Reflective Approach', in Rittberger, Volker (ed.), *Regime Theory and International Relations* (Clarendon Press, 1993),

Hurrell, Andrew, *On Global Order. Power, Values, and the Constitution of International Society* Oxford University Press, 2007),

Ivison, Duncan, 'Justifying Punishment in Intercultural Contexts: Whose Norms? Which Values?', in Matravers, Matt (ed.), *Punishment and Political Theory* (Hart, 1999), p. 88

Johnstone, Ian, 'Treaty Interpretation: The Authority of Interpretive Communities' (1991) 12 *Michigan Journal of International Law* 371

Johnstone, Ian, 'Security Council Deliberations: The Power of the Better Argument' (2003) 14 *European Journal of International Law* 437-480

Kapur, Amrita, 'The Rise of International Criminal Law: Intended and Unintended Consequences: A Reply to Ken Anderson' (2009) 20 *European Journal of International Law* 1031–1041

Kaul, Hans-Peter, 'From Nuremberg to Kampala - Reflections on the Crime of Aggression' (2011) 43 *Stud. Transnat'l Legal Pol'y* 59-84

Kelsen, Hans, *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems* Steven & Sons, 1950),

Kelsen, Hans, *Pure Theory of Law* University of California Press, 1967),

Kemp, Gerhard, *Individual Criminal Liability for the International Crime of Aggression* Intersentia, 2010),

Kennedy, David, 'Theses About International Law Discourse' (1980) 23 *German Yearbook of International Law* 353

Kennedy, David, *International Legal Structures* Nomos Publishers, 1987),

Kennedy, David, *Of War and Law* Princeton University Press, 2006),

Kennedy, David, 'Lawfare and Warfare', in Crawford, James & Martti Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge University Press, 2012),

Kennedy, Duncan, 'The Structure of Blackstone's Commentaries' (1979) 28 *Buffalo Law Review* 205-382

Kennedy, Duncan, *A Critique of Adjudication. {Fin De Siècle}* Harvard University Press, 1997),

Keohane, Robert O., 'International Relations and International Law: Interests, Reputation, Institutions' (1999) 93 *American Society of International Law Proceedings* 375

Kirchheimer, Otto, *Political Justice. The Use of Legal Procedure for Political Ends* Princeton University Press, 1961),

Klabbers, Jan, 'Just Revenge? The Deterrence Argument in International Criminal Law', in *Finnish Yearbook of International Law* (2000),

Klabbers, Jan, *International Law* Cambridge University Press, 2013),

Köchler, Hans, *Humanitarian Intervention in the Context of Modern Power Politics* MG-Studio, 2001),

Koskenniemi, Martti, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4-32

Koskenniemi, Martti, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* Cambridge University Press, 2001),

Koskenniemi, Martti, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook for United Nations Law* 1-36

Koskenniemi, Martti, '‘The Lady Doth Protest Too Much.’ Kosovo, and the Turn to Ethics in International Law' (2002) 65 *The Modern Law Review* 159-175

Koskenniemi, Martti, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* Cambridge University Press, 2005),

Kosovo, The Independent International Commission on, *The Kosovo Report* Oxford University Press, 2000),

Kratochwil, Friedrich, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* Cambridge University Press, 1989),

Kratochwil, Friedrich, *The Status of Law in World Society: Meditations on the Role and Rule of Law* Cambridge University Press, 2014),

Kress, Claus, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus' (2010) 20 *European Journal of International Law* 1129-1146

Kress, Claus, 'Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force' (2014) 1 *Journal on the Use of Force and International Law* 11-54

Kress, Claus & Leonie von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 *Journal of International Criminal Justice* 1179-1217

Lasson, Adolf, *Princip Und Zukunft Des Völkerrechts* Hertz, 1871),

Leander, Anna, 'Practices (Re)Producing Order: Understanding the Role of Business in Global Security Governance', in Leander, Morten Ougaard & Anna (ed.), *Business and Global Governance* (Routledge, 2009), pp. 57-77

Leclerc-Gagne, Elise & Michael Byers, 'A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention' (2009) 41 *Case Western Reserve Journal of International Law* 379-390

Lind, E. Allan & Tom R. Tyler, *The Social Psychology of Procedural Justice* Plenum Press, 1988),

Lindahl, Hans, *Fault Lines of Globalization: Legal Order and the Politics of a-Legality* Oxford University Press, 2013),

Liste, Philip, 'Articulating the Nexus of Politics and Law: War in Iraq and the Practice within Two Legal Systems' (2008) 2 *International Political Sociology* 38-55

Luban, David, 'Hannah Arendt as a Theorist of International Criminal Law' (2011) 11 *International Criminal Law Review* 621-641

Luban, David, 'State Criminality and the Ambition of International Criminal Law', in Isaacs, Tracy & Richard Vernon (eds.), *Accountability for Collective Wrongdoing* (Cambridge University Press, 2011), pp. 61-91

Lyotard, Jean-Francois, *The Differend. Phrases in Dispute* University of Minnesota Press, 1988),

Maguire, Mark, Rod Morgan & Robert Reiner (eds.), *The Oxford Handbook of Criminology*, 5th edn (University of Oxford Press, 2012),

May, Larry, *Crimes against Humanity: A Normative Account* Cambridge University Press, 2005),

May, Larry, *Aggression and Crimes against Peace* Cambridge University Press, 2008),

May, Larry, 'Aggression, Humanitarian Intervention, and Terrorism' (2009) 41 *Case Western Reserve Journal of International Law* 321-340

McDougall, Carrie, *The Crime of Aggression under the Rome Statute of the International Criminal Court* Cambridge University Press, 2013),

Mégret, Frédéric, 'Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project' (2001) 12 *Finnish Yearbook of International Law* 195-247

Mégret, Frédéric, '‘War’? Legal Semantics and the Move to Violence' (2002) 13 *European Journal of International Law* 361-399

Mégret, Frédéric, 'International Law as Law', in Koskenniemi, James Crawford & Martti (ed.), *The Cambridge Companion to International Law* (Cambridge University Press, 2012), pp. 64-92

Milanovic, Marko, 'Aggression and Legality. Custom in Kampala' (2012) 10 *Journal of International Criminal Justice* 165-187

Morgenthau, Hans, *Die Internationale Rechtspflege, Ihr Wesen Und Ihre Grenzen* Noske, 1929),

Morgenthau, Hans, *In Defense of the National Interest. A Critical Examination of American Foreign Policy* Knopf, 1951),

Morgenthau, Hans, *A New Foreign Policy for the United States* Praeger, 1969),

Murphy, Sean D., 'Aggression, Legitimacy and the International Criminal Court' (2009) 20 *European Journal of International Law* 1147-1156

Murphy, Sean D., 'Criminalizing Humanitarian Intervention' (2009) 41 *Case Western Reserve Journal of International Law* 341

Neff, Stephen C., *War and the Law of Nations. A General History* Cambridge University Press, 2005),

Neier, Aryeh, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* Times Books, 1998),

Nouwen, Sarah, 'Justifying Justice', in Crawford, James & Martti Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge University Press, 2012), pp. 327-351

Nouwen, Sarah & Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941-965

Nouwen, Sarah & Wouter Werner, 'Monopolizing Global Justice. International Criminal Law as Challenge to Human Diversity' (2015) *Journal of International Criminal Justice* 157-176

Ohlin, Jens, 'Towards a Unique Theory of International Sentencing', in Sluiter, Göran & Sergey Vasiliev (eds.), *International Criminal Procedure: Towards a Coherent Body of Law* (Cameron May, 2009), pp. 373-404

Onuf, Nicholas, *World of Our Making: Rules and Rule in Social Theory and International Relations* University of South Carolina Press, 1989),

Orford, Anne, *International Authority and the Responsibility to Protect* Cambridge University Press, 2011),

Osiel, Mark, *Mass Atrocity, Collective Memory, and the Law* Transaction Publishers, 1997),

Pal, Radha Binod, *Crimes in International Relations* University of Calcutta Press, 1955),

Paulus, Andreas, 'Second Thoughts on the Crime of Aggression' (2009) 20 *European Journal of International Law* 1117-1128

Politi, Mauro, 'The Icc and the Crime of Aggression. A Dream That Came through and the Reality Ahead' (2012) 10 *Journal of International Criminal Justice* 267-288

Posner, Eric, 'Political Trials in Domestic and International Law' (2005) 55 *Duke Law Journal* 75-152

Rajkovic, Nikolas, '‘Global Law’ and Governmentality: Reconceptualizing the ‘Rule of Law’ as Rule ‘through’ Law' (2012) 18 *European Journal of International Relations* 29-52

Rajkovic, Nikolas, 'Rules, Law, and the Politics of Legality: Critical Sociology and International Law’s Rule' (2014) 27 *Leiden Journal of International Law* 331-352

Rawls, John, 'Justice as Fairness: Political Not Metaphysical' (1985) 14 *Philosophy & Public Affairs* 223-251

Reisinger Coracini, Astrid, 'The International Criminal Court’s Exercise of Jurisdiction over the Crime of Aggression – at Last… in Reach… over Some' 2 *Goettingen Journal of International Law* 745-789

Reisman, Michael & Myres McDougal, 'Humanitarian Intervention to Protect the Ibos', in Lillich, Richard (ed.), *Humanitarian Intervention and the United Nations* (University of Virginia Press, 1973),

Reus-Smit, Christian, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations* Princeton University Press, 1999),

Robinson, Darryl, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 925-963

Rodin, David, 'The Myth of Self-Defence', in Lazar, Cécile Fabre & Seth (ed.), *The Morality of Defensive War* (Oxford University Press, 2014), pp. 69-89

Rogat, Yosal, *The Eichman Trial and the Rule of Law* Center for the Study of Democratic Institutions, 1961),

Röling, B.V.A., *Strafbaarheid Van De Agressieve Oorlog* Wolters, 1950),

Rosenne, Shabtai, *The Perplexities of Modern International Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2003),

Ruys, Tom & Sten Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence' (2005) 10 *Journal of Conflict and Security Law* 289-320

Schabas, William, *An Introduction to the International Criminal Court*, 3rd edn Cambridge University Press, 2007),

Schachter, Oscar, *International Law in Theory and Practice* Martinus Nijhoff Publishers, 1991),

Schachter, Oscar, 'The United Nations Legal Order: An Overview', in Joyner, Christopher C. (ed.), *The United Nations and International Law* (Cambridge University Press, 1997),

Schauer, Frederick, *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* Clarendon Press, 1991),

Scheffer, David, 'States Parties Approve New Crimes for International Criminal Court' (2010) 14 *ASIL Insights*

Schmitt, Carl, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* Telos Press Publishing, 2003),

Schmitt, Carl, *The Concept of the Political: Expanded Edition* The University of Chicago Press, 2007),

Sellars, Kirsten, 'Imperfect Justice at Nuremberg and Tokyo' (2010) 21 *European Journal of International Law* 1085-1102

Sellars, Kirsten, 'William Patrick and ‘Crimes against Peace’ at the Tokyo Tribunal, 1946-48' (2011) 15 *Edinburgh Law Review* 166-196

Shaw, Malcolm N., *International Law*, 6th edn Cambridge University Press, 2008),

Shklar, Judith, *Legalism. Law, Morals, and Political Trials* Harvard University Press, 1964),

Sicking, Louis, *De Piraat En De Admiraal* Brill, 2014),

Simma, Bruno, 'Nato, the U.N. And the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1-22

Simpson, Gerry, *Law, War & Crime* Polity, 2007),

Snyder, Jack & Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2003/04) 28 *International Security* 5-44

Stahn, Carsten, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 *American Journal of International Law* 99-120

Stone, Julius, *Conflict through Consensus: United Nations Approaches to Aggression* Johns Hopkins University Press, 1977),

Stone, Julius, 'Hopes and Loopholes in the 1974 Definition of Aggression ' (1977) 71 *American Journal of International Law* 224-246

Stowell, Ellery C., *Intervention in International Law* John Byrne & Co., 1921),

Sunstein, Cass R., 'On the Expressive Function of Law' (1996) 5 *East European Constitutional Review* 66

Tallgren, Immi, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *European Journal of International Law* 561-595

Tams, Christian, 'The Use of Force against Terrorists' (2009) 20 *European Journal of International Law* 359-397

Tams, Christian, 'The Use of Force against Terrorists: A Rejoinder to Federico Sperotto and Kimberley N. Trapp' (2009) 20 *European Journal of International Law* 1057-1062

Toope, Stephen, 'Emerging Patterns of Global Governance', in Byers, Michael (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000),

Trahan, Jennifer, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference' (2011) 11 *International Criminal Law Review* 49-104

Trapp, Kimberley, 'The Use of Force against Terrorists: A Reply to Christian J. Tams' (2009) 20 *European Journal of International Law* 1049–1055

Tsagourias, Nicholas, 'Necessity and the Use of Force: A Special Regime', in *Netherlands Yearbook of International Law. Necessity across International Law* (T.M.C. Asser Press, 2010), pp. 11-44

van der Wilt, Harmen, 'Crimes against Humanity: A Category *Hors Concours* in (International) Criminal Law? ', in al., Britta van Beers et (ed.), *Humanity across International Law and Biolaw* (Cambridge University Press, 2014), pp. 25-41

van Sliedregt, Elies, 'The Curious Case of International Criminal Liability' (2012) 10 *Journal of International Criminal Justice* 1171-1188

van Sliedregt, Elies & Sergey Vasiliev, 'Pluralism: A New Framework for International Criminal Justice', in van Sliedregt, Elies & Sergey Vasiliev (eds.), *Pluralism in International Criminal Law* (Oxford University Press, 2014), pp. 3-38

Van Wijk, Joris, 'Should We Ever Say Never? Arguments against Granting Amnesty Tested', in Letschert, R. et al (ed.), *Victimological Approaches to International Crimes* (Intersentia, 2011), pp. 289-314

Vergès, Jacques, *De La Stratégie Judiciaire* Les éditions de minuit, 1968),

Vitoria, Francisco, *Political Writings* ed. by Pagden and Lawrence, 1991),

Vos, Jan Anne, 'World Legislation as Deliberation About the Common Good of International Society' (2011) 8 *International Organizations Law Review* 241-251

Walzer, Michael, *Just and Unjust Wars. A Moral Argument with Historical Illustrations*, 4th edn Basic Books, 1977),

Watson (trans.), Burton, *Mo Tzu: Basic Writings* Columbia University Press, 1963),

Weisbord, Noah, 'Prosecuting Aggression' (2008) 49 *Harvard International Law Journal* 161-220

Wenaweser, Christian, 'Reaching the Kampala Compromise on Aggression: The Chair's Perspective' (2010) 23 *Leiden Journal of International Law* 883

Werner, Wouter, 'The Changing Face of Enmity: Carl Schmitt's International Theory and the Evolution of the Legal Concept of War' (2010) 2 *International Theory* 351-380

Werner, Wouter, 'The Curious Career of Lawfare' (2010) 43 *Case Western Reserve Journal of International Law* 61-72

Werner, Wouter, 'The Use of Law in International Political Sociology' (2010) 4 *International Political Sociology* 304-307

Werner, Wouter, 'Security and International Law: Between Legalism and Securitisation', in Bourbeau, Philipe (ed.), *Security: Dialogue across Disciplines* (Cambridge University Press, 2015),

Werner, Wouter G. & Jaap H. De Wilde, 'The Endurance of Sovereignty' (2001) 7 *European Journal of International Relations* 283-313

Wiener, Antje, *The Invisible Constitution of Politics: Contested Norms and International Encounters* Cambridge University Press, 2008),

Williams, Paul R., 'Lawfare: A War Worth Fighting' (2010) 43 *Case Western Reserve Journal of International Law* 145-152

Williams, Paul R. & Michael P. Scharf, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia* Rowman & Littlefield Publishers, 2002),

Wilmshurst, Elizabeth, 'Chatham House Principles on the Use of Force in Self-Defence' (2006) 55 *International and Comparative Law Quarterly* 963-972

Wilmshurst, Elizabeth, 'Aggression', in al., Robert Cryer et (ed.), *An Introduction to International Criminal Law and Procedure*, 2nd edn (Cambridge: Cambridge University Press, 2010),

Wittgenstein, Ludwig, *Philosophical Investigations* Prentice-Hall, 1958),

Yasuaki, Onuma, 'International Law in and with International Politics: The Functions of International Law in International Society' (2003) 14 *European Journal of International Law* 105-139

Zimring, Franklin E. & Gordon J. Hawkins, *Deterrence* University of Chicago Press, 1973),

CURRICULUM VITAE

Marieke de Hoon is a lawyer specializing in international criminal law, public international law and human rights law. She obtained her Bachelor of Laws degree (LL.B. cum laude) and her Master of Laws degree (LL.M. cum laude) from Utrecht University. She currently holds a position as Assistant Professor at the Transnational Legal Studies department of the Faculty of Law of VU University in Amsterdam. Her research focuses on the law and politics of international criminal justice and use of force, and she teaches international law and the international law clinic. She is moreover Senior Counsel at the Public International Law & Policy Group (PILPG) and Co-Director of PILPG's Netherlands Office, where she provides legal assistance to clients in conflict and post-conflict situations with regard to peace negotiations, post-conflict rule of law development, transitional justice, and human rights redress.